(12)

No. 05-998
Title: United States, Petitioner
v.
Juan Resendiz-Ponce
Docketed: February 8, 2006
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (04-10302)
Decision Date: October 11, 2005
Questions Presented

| ~~Date~~ | ~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Dec 30 2005 | Application (05A582) to extend the time to file a petition for a writ of certiorari from January 9, 2006 to February 8, 2006, submitted to Justice O'Connor. |
| Jan 3 2006 | Application (05A582) granted by Justice O'Connor extending the time to file until February 8, 2006. |
| Feb 8 2006 | Petition for a writ of certiorari filed. (Response due March 10, 2006) |
| Mar 9 2006 | Brief of respondent Juan Resendiz-Ponce in opposition filed. |
| Mar 9 2006 | Motion for leave to proceed in forma pauperis filed by respondent. |
| Mar 22 2006 | DISTRIBUTED for Conference of April 14, 2006. |
| Mar 23 2006 | Reply of petitioner United States filed. (Distributed) |
| Apr 17 2006 | Motion for leave to proceed in forma pauperis filed by respondent GRANTED. |
| Apr 17 2006 | Petition GRANTED. |
| Apr 25 2006 | Motion to appoint counsel filed by respondent Juan Resendiz-Ponce. |
| May 5 2006 | Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including June 23, 2006. |
| May 9 2006 | Motion DISTRIBUTED for Conference of May 25, 2006. |
| May 30 2006 | Motion to appoint counsel filed by respondent GRANTED. Atmore Baggot, Esquire, of Apache Junction, Arizona is appointed to serve as counsel for the respondent in this case. |
| Jun 23 2006 | Joint appendix filed. |
| Jun 23 2006 | Brief of petitioner United States filed. |
| Jul 3 2006 | Letter from the Solicitor General regarding Joint Appendix received. (Distributed). |
| Jul 14 2006 | SET FOR ARGUMENT on Tuesday, October 10, 2006. |
| Jul 25 2006 | CIRCULATED. |
| Jul 25 2006 | Extension of time within which to file respondent's brief on the merits to and including August 25, 2006. |
| Jul 27 2006 | Record received from U.S.C.A. for the 9th Circuit. |
| Aug 10 2006 | Brief amicus curiae of Paul Hardy filed. (Distributed) |
| Aug 14 2006 | Record received from U.S.D.C. for District of Arizona (Phoenix). (1 box) |
| Aug 24 2006 | Brief of respondent Juan Resendiz-Ponce filed. (Distributed) |
| Aug 25 2006 | Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed) |
| Aug 25 2006 | Brief amicus curiae of National Association of Federal Defenders filed. (Distributed) |
| Sep 28 2006 | Reply of petitioner United States filed. (Distributed) |
| Oct 3 2006 | Opposition of Juan Resendez-Ponce to motion for appointment of counsel. |

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|---|---|
| Oct 5 2006 | Response of counsel to opposition to motion for appointment of counsel. |
| Oct 5 2006 | Motion DISTRIBUTED for Conference of October 6, 2006.. |
| Oct 10 2006 | Argued. For petitioner: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D.C. For respondent: Altmore L. Baggot, Apache Junction, Ariz. (Appointed by this Court.) |
| Oct 13 2006 | The parties are directed to file supplemental briefs addressing the following Question: "Did the indictment omit an allegation that was required by the Fifth Amendment?" The briefs, not to exceed 25 pages, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, October 27, 2006. Reply briefs, not to exceed 10 pages, may be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, November 3, 2006. |
| Oct 27 2006 | Supplemental brief of respondent Juan Resendiz-Ponce filed. (Distributed) |
| Oct 27 2006 | Supplemental brief of petitioner United States filed. (Distributed) |

Supreme Court, U.S.
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No. 05-998

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

JUAN RESENDIZ-PONCE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error.

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# In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

*v.*

JUAN RESENDIZ-PONCE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 425 F.3d 729.

### JURISDICTION

The judgment of the court of appeals was entered on October 11, 2005. On January 3, 2006, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 8, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.

## STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, respondent was convicted of attempting to reenter the United States after deportation, in violation of 8 U.S.C. 1326(a). He was sentenced to 63 months of imprisonment, to be followed by three years of supervised release. C.A. E.R. 63-65. The court of appeals reversed and remanded on the grounds that the indictment omitted an element of the offense and that the omission constituted a "fatal flaw" necessitating automatic reversal. App., *infra*, 1a-10a.

1. On August 28, 2002, respondent, a Mexican national, was convicted in state court of kidnapping his former stepdaughter (who was also the mother of his 3-year-old child). While respondent was jailed for that offense, he admitted that he had previously been deported from the United States and that he had thereafter reentered the country without first obtaining permission to do so. On October 15, 2002, respondent was again removed from the country. App., *infra*, 2a; Presentence Report ¶ 18.

On June 1, 2003, respondent approached the port of entry at San Luis, Arizona, and presented a green card and driver's license to the border agent. Both forms of identification actually belonged to respondent's cousin, Antonio Resendiz. Respondent told the agent that he

was a legal resident and that he was going to Calexico, California. Because respondent did not resemble the person on the identification cards, the agent referred him to secondary inspection. When the agent at secondary inspection asked respondent about his intended destination, he said that he was going to Phoenix. Respondent was then detained. App., *infra*, 2a; Gov't C.A. Br. 3-5.

2. On July 30, 2003, a grand jury in the District of Arizona indicted respondent on one count of attempting to reenter the United States after deportation, in violation of 8 U.S.C. 1326(a). The indictment made the following allegations:

> On or about June 1, 2003, JUAN RESENDIZ-PONCE, an alien, knowingly and intentionally attempted to enter the United States of America at or near San Luis in the District of Arizona, after having been previously denied admission, excluded, deported, and removed from the United States at or near Nogales, Arizona, on or about October 15, 2002, and not having obtained the express consent of the Secretary of the Department of Homeland Security to reapply for admission.

App., *infra*, 2a. The indictment also indicated that respondent was being charged under 8 U.S.C. 1326(a) and that the government was seeking a sentencing enhancement under 8 U.S.C. 1326(b)(2), which provides for a higher maximum sentence where the prior removal was subsequent to a conviction for commission of an aggravated felony. App., *infra*, 3a.

3. Before trial, respondent moved to dismiss the indictment. Under Ninth Circuit law, one element of the offense of attempted unlawful reentry is that "the defen-

dant committed an overt act that was a substantial step towards reentering without * * * consent." *United States* v. *Gracidas-Ulibarry*, 231 F.3d 1188, 1196 (2000) (en banc). In his motion to dismiss, respondent contended that the indictment "fail[ed] to allege an essential element, an overt act, or to state the essential facts of such overt act." Mot. to Dismiss 3. The district court orally denied the motion. C.A. E.R. 6.

At trial, the government introduced uncontested testimony that respondent had presented false identification at the border and made contradictory statements concerning his intended destination. See Tr. 191 (summarizing testimony). At the close of the evidence, the district court instructed the jury that the government was required to prove beyond a reasonable doubt, *inter alia*, that respondent had "attempted to enter the United States * * * by intentionally committing an overt act that was a substantial step towards reentering the United States." C.A. E.R. 36-37. The jury returned a guilty verdict, and the district court enhanced respondent's sentence on the ground that respondent's prior removal was subsequent to a conviction for commission of an aggravated felony (*viz.*, his conviction for kidnapping). App., *infra*, 3a. Respondent was sentenced to 63 months of imprisonment, to be followed by three years of supervised release. C.A. E.R. 63-65.

4. The court of appeals reversed and remanded for dismissal of the indictment. App., *infra*, 1a-10a. The court first noted that the commission of an overt act is an "essential element" of the crime of attempted unlawful reentry, *id.* at 3a-4a, and that "[t]he indictment in this case does not explicitly allege an overt act," *id.* at 4a. The court rejected the government's contention that the indictment *implicitly* alleged an overt act. *Id.* at 4a-

6a. Citing its earlier decision in *United States* v. *Du Bo*, 186 F.3d 1177 (9th Cir. 1999), the court then held that, where the defendant made a timely objection at trial, "[f]ailure to allege an essential element of the offense is a fatal flaw not subject to mere harmless error analysis." App., *infra*, 6a. "The purpose of this rule," the court explained, "is to secure the basic institutional purpose of the grand jury, by ensuring that a defendant is not convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury that indicted him." *Ibid.* The court noted that "[a] grand jury never passed on a specific overt act, and [respondent] was never given notice of what specific overt act would be proved at trial." *Id.* at 7a. The court therefore concluded that "failure to allege any specific overt act that is a substantial step toward entry is a fatal defect in an indictment for attempted entry following deportation under 8 U.S.C. § 1326." *Ibid.*

Judge Reavley, sitting by designation, concurred. App., *infra*, 7a-10a. He stated that he was obligated to concur "because of this circuit's precedent," but that he "fail[ed] to see any other reason for this holding." *Id.* at 7a. "An indictment is constitutionally sufficient," he explained, "if it clearly informs the defendant of the precise offense of which he is accused so that he may prepare his defense and so that a judgment thereon will safeguard him from a subsequent prosecution for the same offense." *Id.* at 7a-8a. Judge Reavley contended that the indictment "fairly implied" that respondent had committed the requisite overt act, and concluded that "[t]he indictment should pass muster and would do so in other circuits." *Id.* at 9a.

5. Shortly after the panel's decision in this case, the Ninth Circuit denied the petition for rehearing en banc

in *United States* v. *Omer*, 429 F.3d 835 (2005), in which the government sought reconsideration of the rule, from the Ninth Circuit's earlier decision in *Du Bo*, *supra*, that the omission of an element of the offense from a federal indictment constituted structural error necessitating automatic reversal. App., *infra*, 11a-12a.

Judge Graber, joined by Judges Kozinski, O'Scannlain, Bybee, Callahan, and Bea, dissented from the denial of rehearing en banc in *Omer*. App., *infra*, 12a-28a. She reasoned that the "absolute rule" of *Du Bo* "makes no sense" and that the court "should take this opportunity to reconsider [it]." *Id.* at 12a. Judge Graber first contended that, to the extent that the rule of *Du Bo* rested on the premise that the omission of an element from an indictment was of jurisdictional significance, that premise was "directly eliminated" by this Court's decision in *United States* v. *Cotton*, 535 U.S. 625 (2000). App., *infra*, 15a. She then explained that the *Du Bo* rule was more generally inconsistent with this Court's decision in *Neder* v. *United States*, 527 U.S. 1 (1999), which held that the omission of an offense element from the petit jury's instructions does not constitute structural error. App., *infra*, 21a-22a. Judge Graber reasoned that "[t]he situation in *Neder* presents a close parallel to the omission of an element from an indictment and leaves us with an incongruity: Omission of an element from an indictment is subject to automatic reversal, but omission of the same element from a jury instruction is not." *Id.* at 22a. "[T]he right to a grand jury finding of probable cause as to each element of the offense," she continued, "is no more important, and no more central to the fundamental fairness of a prosecution, than the right to a petit jury's finding that each element was proved beyond a reasonable doubt." *Ibid.*

Judge Graber also rejected the proposition that "there is no way to evaluate, or to cure, any prejudice caused by the omission of an element from the indictment." App., *infra*, 22a. To the contrary, she reasoned, "it is possible (and, indeed, commonplace) to review the omission of an element from a grand jury's indictment for harmless error." *Id.* at 22a-23a. Judge Graber observed that, under this Court's decisions, most errors in grand jury proceedings are subject to harmless-error analysis. *Id.* at 23a. In particular, she noted that this Court's decision in *United States* v. *Mechanik*, 475 U.S. 66 (1986), "suggests that there is nothing about the nature of a grand jury proceeding that precludes harmless error review." App., *infra*, 23a-24a. And she noted that this Court's decision in *Cotton*, *supra*, which held that the omission of a sentence-enhancing fact from a federal indictment did not constitute reversible *plain* error, "rebut[s] the idea that omission of an element from an indictment always renders a criminal proceeding unfair." *Id.* at 24a. Finally, Judge Graber contended that en banc review was warranted because "six of our sister circuits have held explicitly that they will review defective indictments, challenged at various stages, for harmless error." *Id.* at 25a.

After the court of appeals denied the government's petition for rehearing en banc on the structural-error issue in *Omer*, *supra*, the government decided not to seek rehearing en banc on that issue in this case.

## REASONS FOR GRANTING THE PETITION

In the decision below, the court of appeals reaffirmed its rule that the omission of an element of an offense from a federal indictment constitutes structural error. That decision conflicts with the decisions of numerous

other circuits, which have treated such omissions, like most other constitutional errors, as harmless where it is clear beyond a reasonable doubt that the error did not affect the outcome of the proceedings. The decision below is also inconsistent with this Court's decisions—most notably, *Neder* v. *United States*, 527 U.S. 1 (1999), which held that a similar omission from the petit jury's instructions can constitute harmless error. Because the question presented is an important and recurring one in federal prosecutions and is squarely presented in this case, this Court's review is warranted.

1. There is a clear and well-established circuit conflict on the question whether the omission from a federal indictment of an offense element (or a fact that increases the penalty for a crime beyond the statutory maximum)[1] can constitute harmless error. The majority of courts of appeals to have considered the issue have held that such an omission is subject to harmless-error analysis. See *United States* v. *Allen*, 406 F.3d 940, 943-945 (8th Cir. 2005), petition for cert. pending, No. 05-6764 (filed Sept. 29, 2005);[2] *United States* v. *Robinson*, 367 F.3d 278, 285-286 (5th Cir.), cert. denied, 543 U.S. 1005 (2004); *United States* v. *Higgs*, 353 F.3d 281, 304-307 (4th Cir. 2003), cert. denied, 543 U.S. 999 (2004); *United States* v. *Trennell*, 290 F.3d 881, 889-890 (7th Cir.), cert. denied, 537 U.S. 1014 (2002); *United States* v. *Cor-Bon Custom Bullet Co.*, 287 F.3d 576, 580-581 (6th Cir.), cert. denied, 537 U.S. 880 (2002); *United States* v. *Prentiss*, 256 F.3d

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[1] This Court has suggested that a sentence-enhancing fact is the "functional equivalent" of an offense element. *Apprendi* v. *New Jersey*, 530 U.S. 466, 494 n.19 (2000).

[2] The government has filed a brief in *Allen* suggesting that it be held pending the disposition of this case. A copy of this petition is being provided to the petitioner in *Allen*.

971, 981-985 (10th Cir. 2001) (en banc); *United States* v. *Corporan-Cuevas*, 244 F.3d 199, 202 (1st Cir.), cert. denied, 534 U.S. 880 (2001). By contrast, the Third Circuit, like the Ninth Circuit in this case, has held that such an omission requires automatic reversal. See *United States* v. *Spinner*, 180 F.3d 514, 515-516 (3d Cir. 1999). Judges and commentators alike have recognized the existence of this conflict. See, *e.g.*, App., *infra*, 25a-26a (Graber, J., dissenting from denial of rehearing en banc in *Omer*); *Prentiss*, 256 F.3d at 992-993 (Henry, J., dissenting in part); 4 Wayne R. LaFave et al., *Criminal Procedure* § 19.3(a), at 155, 161 n.39.51 (2d ed. Supp. 2006).

2. Under the Ninth Circuit's view of the elements of an attempt to reenter the United States in violation of 8 U.S.C. 1326(a), the indictment in this case was constitutionally deficient because it did not allege the commission of an overt act that was a substantial step toward unlawful reentry.[3] In order to ensure that the grand jury considers all of the elements of the offense in determining whether to indict, the Grand Jury Clause of the Fifth Amendment requires that every offense element be charged in a federal indictment. See, *e.g.*, *Hamling* v. *United States*, 418 U.S. 87, 117 (1974).[4] The

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[3] The government does not seek review of the court of appeals' threshold holdings that the commission of an overt act was an element of the offense of attempted unlawful reentry and that the indictment failed to allege that element implicitly by alleging that the defendant had engaged in an "attempt[]" to reenter unlawfully.

[4] A claim that an indictment does not allege all of the elements of the underlying offense is conceptually distinct from a claim that an indictment provides insufficient detail to inform the defendant of the nature of the charge against him. The latter claim is better classified as a Sixth Amendment notice claim. See U.S. Const. Amend. VI (providing that

court of appeals erred, however, by holding that the omission of an offense element necessitates automatic reversal. That holding cannot be squared with this Court's precedents on harmless-error review.

a. This Court has identified a narrow class of fundamental constitutional errors as so intrinsically harmful that they require reversal without inquiry into whether they had an effect on the outcome. See, *e.g.*, *Johnson* v. *United States*, 520 U.S. 461, 468-469 (1997) (listing examples). Errors are intrinsically harmful, or "structural," only when they "infect the entire trial process," *Brecht* v. *Abrahamson*, 507 U.S. 619, 629-630 (1993), and "necessarily render a trial fundamentally unfair," *Rose* v. *Clark*, 478 U.S. 570, 577 (1986). See *Neder*, 527 U.S. at 8. With respect to other types of constitutional error as to which the defendant made a timely objection at

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"the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation"). In order for a defendant to obtain reversal based on a claimed infringement of the Sixth Amendment right to notice, he must establish that the insufficient notice caused prejudice to the defense. See, *e.g.*, *United States* v. *Wydermyer*, 51 F.3d 319, 325 (2d Cir. 1995) (noting that, despite assertion that the indictment was insufficient, "[t]he defendants were not 'prejudicially surprised' by the claimed omission of elements of the offense in violation of the defendants' Sixth Amendment right to notice of the charges") (citation omitted) (quoting *United States* v. *Miller*, 471 U.S. 130, 134 (1985)). While the court of appeals mentioned in passing that respondent had a right "to be apprised of what overt act the government will try to prove at trial," App., *infra*, 6a, it ultimately justified its rule of automatic reversal by explaining that "[t]he purpose of this rule is to secure the basic institutional purpose of the grand jury, by ensuring that the defendant is not convicted on the basis of facts not found by, and perhaps not even presented to the grand jury that indicted him," *ibid.* (internal quotation marks omitted). This case thus implicates a rule of automatic reversal for Fifth Amendment violations, not a Sixth Amendment rule.

trial, an appellate court must disregard the error as harmless where it is clear beyond a reasonable doubt that the error did not affect the outcome of the proceedings. See, *e.g.*, *id.* at 7-8.

b. In *Neder*, this Court held that the failure to instruct the petit jury on an element of the offense does not constitute structural error. 527 U.S. at 8-15. The Court reasoned that "[t]he error at issue here * * * differs markedly from the constitutional violations that we have found to defy harmless-error review." *Id.* at 8. "Unlike such defects as the complete deprivation of counsel or trial before a biased judge," the Court explained, "an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 9. With regard to the error at issue, the Court noted that "[the defendant] was tried before an impartial judge, under the correct standard of proof and with the assistance of counsel," and "a fairly selected, impartial jury was instructed to consider all of the evidence and argument in respect to [the defendant's] defense against the tax charges." *Ibid.*

Contrary to the court of appeals' reasoning in its earlier decision in *United States* v. *Du Bo*, 186 F.3d 1177, 1180 n.2 (9th Cir. 1999), there is no justification for treating the failure to submit an offense element to the grand jury differently from the failure to submit an offense element to the petit jury. The omission of an element from the indictment does not render a criminal prosecution "fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder*, 527 U.S. at 9. If anything, the type of omission at issue here constitutes a far *weaker* candidate for structural error than the type of omission in *Neder*, for at least two reasons.

First, the Fifth Amendment right to an indictment by a grand jury, unlike the Sixth Amendment right to a trial by a petit jury, has not been incorporated against the States through the Fourteenth Amendment as an essential requirement of fundamental fairness. Compare *Hurtado* v. *California*, 110 U.S. 516, 538 (1884) (right to indictment by a grand jury), with *Duncan* v. *Louisiana*, 391 U.S. 145, 147-158 (1968) (right to a trial by a petit jury). It would be incongruous to conclude that a constitutional right that does not even apply in a state prosecution is so fundamental that its infringement in a federal prosecution would give rise to structural error.

Second, although the grand jury undoubtedly performs a vital protective function, it is the petit jury that provides the ultimate protection for the accused. See *United States* v. *Cotton*, 535 U.S. 625, 634 (2002). The grand jury is not the final arbiter of the facts, but instead is merely required to determine, by majority vote, whether there is probable cause to believe that the accused has committed the charged crime. See Fed. R. Crim. P. 6(a) and (f). In grand jury proceedings, moreover, the prosecutor has no obligation to present exculpatory evidence, see *United States* v. *Williams*, 504 U.S. 36, 51-55 (1992); the accused has no right to present evidence at all, see *United States* v. *Calandra*, 414 U.S. 338, 343-344 (1974); and the prosecutor may try again if the grand jury fails to return an indictment, see *Ex parte United States*, 287 U.S. 241, 250-251 (1932).[5] It

[5] Other protections afforded to the accused at the trial stage are not afforded at the grand jury stage. Whereas the accused has the right to a public trial, see U.S. Const. Amend. VI; *Waller* v. *Georgia*, 467 U.S. 39, 46 (1984), the grand jury operates in secret, see Fed. R. Crim. P. 6(d) and (e). Moreover, the grand jury may consider evidence that

therefore follows, *a fortiori*, from *Neder*'s holding—that the failure to obtain a finding by the petit jury on an element of an offense is not structural error—that the omission of an offense element from an indictment is not structural error either.

c. Other decisions by this Court reinforce the conclusion that the omission of an offense element from a federal indictment is amenable to harmless-error analysis. In *United States* v. *Mechanik*, 475 U.S. 66 (1986), the Court held that the defendants were not entitled to reversal of their convictions because of an error in the grand jury proceedings. In that case, two witnesses appeared simultaneously before the grand jury, in violation of Federal Rule of Criminal Procedure 6(d). The Court acknowledged that the error "had the theoretical potential to affect the grand jury's determination whether to indict these particular defendants for the offenses with which they were charged." 475 U.S. at 70. The Court ultimately concluded, however, that "the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt." *Ibid.* *Mechanik* therefore stands for two propositions. First, contrary to the court of appeals' apparent suggestion in *Du Bo*, see 186 F.3d at 1179, errors in grand jury proceedings can generally be analyzed for harmlessness. See *Mechanik*, 475 U.S. at 70; accord *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988). Second, in evaluating whether an error at the grand jury stage is in fact harmless, a reviewing court may appropriately con-

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would not be admissible at trial. See, *e.g.*, *Calandra*, 414 U.S. at 349-355 (evidence obtained in violation of the Fourth Amendment); *Costello* v. *United States*, 350 U.S. 359, 361-364 (1956) (inadmissible hearsay).

sider the entire record, including the petit jury's subsequent verdict. See *Mechanik*, 475 U.S. at 70; accord *United States* v. *Lane*, 474 U.S. 438, 448 n.11 (1986); *United States* v. *Hasting*, 461 U.S. 499, 509 n.7 (1983).

In *Cotton*, *supra*, the Court held that the failure *both* to allege a sentence-enhancing fact (*i.e.*, drug quantity) in the indictment *and* to obtain a finding on that fact from the petit jury did not constitute reversible error. 535 U.S. at 631-634. Because the defendants in *Cotton* did not preserve their objection at trial, the case involved the federal plain-error doctrine, which applies when the defendant fails to make a timely objection in the district court. Fed. R. Crim. P. 52(b). Under that doctrine, a reviewing court asks whether (1) there is error; (2) the error is plain; (3) the error affects substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Johnson*, 520 U.S. at 466-467.

In *Cotton*, the Court concluded that the fourth component of the plain-error inquiry was not satisfied because any error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. 535 U.S. at 632-633. That conclusion suggests that such an error is not structural either, insofar as a structural error is one that "*necessarily* render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder*, 527 U.S. at 9. At least one of the courts of appeals that have held that the omission of an offense element from an indictment does not constitute structural error has construed *Cotton* in that fashion. See *Robinson*, 367 F.3d at 285-286.[6] Moreover,

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[6] Although the Ninth Circuit's decision in *Du Bo* and the Third Circuit's decision in *Spinner* predate *Cotton* (and, for that matter, the

in holding that the fourth component of the plain-error inquiry was not satisfied, the Court noted that the evidence concerning the sentence-enhancing fact was "overwhelming" and "essentially uncontroverted" and concluded that the grand jury "[s]urely" would have found that fact. *Cotton*, 535 U.S. at 633. Like *Mechanik*, therefore, *Cotton* supports the proposition that errors at the grand jury phase can be quantified and are thus properly subject to harmless-error review.

In addition, in *Cotton*, the Court held that defects in an indictment, such as the omission of a sentence-enhancing fact, do not deprive a court of subject-matter jurisdiction over the ensuing prosecution, and overruled its earlier decision in *Ex parte Bain*, 121 U.S. 1 (1887), to the extent that it held otherwise. 535 U.S. at 630-631. The Court explained that "*Bain*'s elastic concept of jurisdiction is not what the term 'jurisdiction' means today, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case." *Id.* at 630 (internal quotation marks omitted). As Judge Graber noted in her dissenting opinion in *Omer* (App., *infra*, 15a), *Cotton* therefore eliminates one of the premises of the court of appeals' rule. See *Du Bo*, 186 F.3d at 1180 (stating that, where an indictment "lacks a necessary allegation," it "does not properly allege an offense against the United States" and "leaves nothing for a petit jury to ratify") (internal quotation marks omitted). Because the decision below, which reaffirmed the *Du Bo* rule, is inconsistent with

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various decisions of other courts of appeals with which they are in conflict), that fact provides no basis for denying review. The Ninth Circuit reaffirmed the *Du Bo* rule both in this case and in *Omer*, and the en banc Ninth Circuit refused to reconsider the *Du Bo* rule in *Omer* despite the government's reliance on *Cotton*. See Pet. for Reh'g at 10-11, *United States* v. *Omer*, 429 F.3d 835 (2005) (No. 03-30513).

*Cotton* in that respect, and because it is more broadly inconsistent with this Court's harmless-error decisions (and the decisions of numerous other circuits), further review is warranted.

3. This case squarely presents an issue of importance to the administration of federal criminal justice. The indictment in this case omitted a single element of the offense of attempted unlawful reentry, as interpreted by the Ninth Circuit: namely, the commission of an overt act that was a substantial step toward unlawful reentry. At trial, the government introduced uncontested testimony that respondent had committed at least two acts that satisfied that element: namely, that respondent had presented false identification at the border and that he had made contradictory statements concerning his intended destination. See Tr. 191 (summarizing testimony). At the close of the evidence, the district court specifically instructed the jury that the government was required to prove, beyond a reasonable doubt, that respondent had committed an overt act. C.A. E.R. 36-37. Having been so instructed, the jury returned a guilty verdict. App., *infra*, 3a. It is therefore clear that, if the court of appeals had applied harmless-error analysis, it would have concluded that the error at issue was in fact harmless, because the grand jury unquestionably would have determined that there was probable cause to believe that respondent had committed the requisite overt act. The Ninth Circuit's rule that the omission of an offense element from a federal indictment constitutes structural error is therefore outcome-determinative in this case.[7]

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[7] The government did not expressly seek reconsideration of the *Du Bo* rule before the court of appeals panel in this case. This Court's

The question presented is a recurring and important one. There are a significant number of cases in which an element of the offense is inadvertently omitted from a federal indictment, whether because of prosecutorial oversight or simply because of uncertainty as to what constitutes an offense element. In those cases, the court of appeals' rule will compel automatic reversal. As this Court has noted, "[t]he reversal of a conviction entails substantial societal costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place." *Mechanik*, 475 U.S. at 72. And because of the "passage of time, erosion of memory, and dispersion of witnesses," requiring a retrial will sometimes "cost society the right to punish admitted offenders," and, even when it does not, "the intervening delay may compromise society's interest in the prompt administration of justice." *Ibid.* (brackets, citations, and internal quotation marks omitted). Applying harmless-error review to the omission of an offense element from a federal indictment appropriately balances "society's interest in punishing the guilty" against the constitutional right to indictment by a grand jury. *Neder*, 527 U.S. at 18 (quoting *Connecticut* v. *Johnson*, 460 U.S. 73, 86 (1983) (plurality opinion)). The Court's

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review is appropriate, however, where, as here, the court of appeals reaffirmed a rule from a recent decision which the government opposed at the time of adoption, see *Du Bo*, 186 F.3d at 1180, and the government did not concede in the instant case that the rule from the earlier decision was correct. See *Williams*, 504 U.S. at 40-45. Moreover, the government did expressly seek reconsideration of the *Du Bo* rule by the en banc Ninth Circuit in *Omer*. Once the en banc court of appeals refused to grant rehearing in that case, it would have been futile to seek reconsideration of the *Du Bo* rule in this one.

intervention is warranted to resolve the clear and entrenched circuit conflict on this important issue.[8]

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2006

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[8] It is not necessary for the Court to hold this petition pending its disposition of *Washington* v. *Recuenco*, cert. granted, No. 05-83 (Oct. 17, 2005). That case presents the discrete question whether an error in enhancing a sentence based on a fact not found by the petit jury, like the omission of an offense element from the jury instructions, is susceptible to harmless-error analysis. This case, by contrast, involves the omission of an *element* of the offense (not a sentence-enhancing fact) at the *grand jury* stage. The outcome of *Recuenco* therefore should not affect the disposition of this case.

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 04-10302

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

JUAN RESENDIZ-PONCE, DEFENDANT-APPELLANT

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Filed: Oct. 11, 2005

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Before GOODWIN, REAVLEY,* and RAWLINSON, Circuit Judges.

GOODWIN, Circuit Judge.

Juan Resendiz-Ponce, a native and citizen of Mexico, challenges his conviction and sentence for attempting to reenter the United States after having been previously deported subsequent to committing an aggravated felony, pursuant to 8 U.S.C. § 1326(a), (b)(2). He argues that (1) the indictment did not adequately allege an overt act; (2) his Miranda rights were violated; (3) the judge erroneously rejected his proffered jury instructions; and (4) his sentence violates the Sixth Amendment. Because the indictment was insufficient and should be dismissed, we do not reach his remaining claims.

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* The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

*Facts and Procedural History*

Resendiz-Ponce entered the United States illegally in 1988, and was ordered deported on March 12, 1997. He reentered the United States illegally in July, 2002. On August 28, 2002, he was convicted of kidnapping his common-law wife and sentenced to 45 days in county jail. On October 15, 2002, while still in county jail, he was questioned by an INS agent and admitted that he was an alien, that he was previously deported, and that he had not sought permission to re-enter from the Attorney General. He was deported later that same day.

In June 2003, Resendiz approached a port of entry at the U.S./Mexican border on foot. Resendiz presented photo identification to the border agent, claiming to be a legal resident. This identification belonged to Antonio Resendiz, Juan's cousin. Because Resendiz did not look like the tendered photo, the agent directed him to a secondary inspection area, where he was questioned. In due course, he was indicted for attempting to reenter the United States in violation of 8 U.S.C. § 1326(a). The indictment reads as follows:

> On or about June 1, 2003, JUAN RESENDIZ-PONCE, an alien, knowingly and intentionally attempted to enter the United States of America at or near San Luis in the District of Arizona, after having been previously denied admission, excluded, deported, and removed from the United States at or near Nogales, Arizona, on or about October 15, 2002, and not having obtained the express consent of the Secretary of the Department of Homeland Security to reapply for admission.

In violation of Title 8, United States Code, Sections 1326(a) and enhanced by (b)(2).

At trial, Resendiz moved to suppress the statements he made to the INS agent while in jail in 2002 because he did not receive Miranda warnings, to dismiss the indictment because it did not allege an overt act, and to strike a portion of the indictment related to 8 U.S.C. § 1326(b)(2) because the indictment did not allege that his prior deportation occurred subsequent to his prior conviction. The district court denied these motions. Resendiz also requested a jury instruction that would have told the jury that the government must prove that Resendiz performed the overt act of successfully re-entering the United States. The court denied this request. Resendiz was convicted. At his sentencing hearing, the district court determined that he was previously deported and that this deportation occurred subsequent to his conviction for an aggravated felony. Therefore, the statutory maximum for his sentence was increased from 2 years to 20 years, pursuant to § 1326(b)(2). He was sentenced to 63 months, the middle of the applicable guideline range of 57-71 months. This appeal followed.

*Jurisdiction and Standard of Review*

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. This court has jurisdiction pursuant to 28 U.S.C. § 1291. We review the sufficiency of an indictment *de novo*. *United States* v. *Rodriguez*, 360 F.3d 949, 958 (9th Cir. 2004).

*Discussion*

The crime of attempted unlawful entry into the United States, as defined by § 1326, includes as an essential element that "the defendant committed an

overt act that was a substantial step toward reentering . . ." *United States* v. *Gracidas-Ulibarry*, 231 F.3d 1188, 1196 (9th Cir. 2000) (*en banc*).[1]

The indictment in this case does not explicitly allege an overt act. It charges neither the physical crossing of the border, nor the tendering of the bogus identification card, nor any other fact, as a substantial step toward reentry. Either or both of those acts could have been stated in the indictment. The government argued to the district court that the "overt act is the attempt to enter in this case" and argues on appeal that "the overt act of an attempted entry crime is the entry itself." The first argument is a non-starter. The overt act with which the defendant is charged obviously cannot be identified with the ultimate legal question of guilt or innocence. The second argument can be construed as either (1) the legal claim that a charge of attempted entry necessarily implies that the associated overt act was actual entry, or (2) the factual claim that in this case, the indictment implicitly alleged physical entry and thus identified an overt act. The district court held that "being here is sufficient to advise [Resendiz] . . . of what it is he's charged with," thus apparently endorsing (2), and possibly also endorsing the proposition that any error was harmless and did not prejudice Resendiz. We reject both of these potential interpreta-

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[1] Unlike the separate offense of "being found in" the United States, where failure to allege the overt act of crossing the border (or other overt act) is not a fatal defect, because not an "essential element," the other two § 1326 offenses for which deported aliens may be prosecuted require an overt act to be alleged in the indictment. *Cf. United States* v. *Bello-Bahena*, 411 F.3d 1083 (9th Cir. 2005).

tions of the government's remaining argument as a ground for salvaging the defective indictment.

The government relies on dicta from a 1921 decision to argue that the overt act related to an attempted reentry is an actual reentry. *Mills* v. *United States*, 273 F. 625, 627 (9th Cir. 1921) ("The attempt is in itself . . . the act of crossing the boundary line into the United States."); *quoted in United States* v. *Corrales-Beltran*, 192 F.3d 1311, 1319-20 (9th Cir. 1999). *Mills* stands only for the proposition that an actual entry is a possible means of violating a statute criminalizing attempted entry, not that it is the only means and that its occurrence is therefore necessarily implied by an attempt charge. *Id.*; *accord United States* v. *Rivera-Relle*, 333 F.3d 914, 921 (9th Cir. 2003) ("The fact that an alien may have completed an entry into the United States does not, in any way, preclude a conviction for attempted entry."). Nothing in these cases suggests that an indictment for attempted entry always or even often implies an actual entry.

The second interpretation of the government's argument is that the indictment implicitly alleged that Resendiz committed the overt act of physically crossing the border by stating that "[o]n or about June 1, 2003, Juan Resendiz-Ponce . . . intentionally attempted to enter the United States at or near San Luis." On this interpretation, apparently endorsed by the district court, Resendiz' current physical presence in the United States warrants the inference that he physically crossed the border, thus rendering the indictment sufficient. It is true that any facts "necessarily implied" by an indictment are presumptively charged. *See, e.g.*, *United States* v. *Hinton*, 222 F.3d 664, 672 (9th Cir. 2000). However, there is an essential logical distinction

between what is implied by the language of the indictment and what is implied by facts outside the four corners of the indictment. Neither common knowledge nor appraisal of probabilities will take the place of an omitted but essential allegation.

Failure to allege an essential element of the offense is a fatal flaw not subject to mere harmless error analysis. *See, e.g., United States* v. *Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999) ("if properly challenged prior to trial, an indictment's complete failure to recite an essential element of the charged offense is not a minor or technical flaw subject to harmless error analysis, but a fatal flaw requiring dismissal"). The purpose of this rule is to secure the basic institutional purpose of the grand jury, by ensuring that a defendant is not "convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury that indicted him." *United States* v. *Keith*, 605 F.2d 462, 464 (9th Cir. 1979); *quoted in Du Bo*, 186 F.3d at 1179. As the Supreme Court has explained, this purpose has its constitutional roots in the Fifth and Sixth Amendments and historical roots in the English common-law tradition. *Russell* v. *United States*, 369 U.S. 749, 770, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962). While this protection may not extend to incidentals and details unnecessary to a conviction, an overt act that is a substantial step toward underlying offense is at the very core of an attempt charge. *Cf. United States* v. *Hinton*, 222 F.3d 664, 672 (9th Cir. 2000) (holding that a slight discrepancy in dates and locations between the grand jury indictment and the facts proved at trial was "not significant"). The defendant has a right to be apprised of what overt act the government will try to prove at trial, and he has a right to have a grand jury consider whether to charge that

specific overt act. Physical crossing into a government inspection area is but one of a number of other acts that the government might have alleged as a substantial step toward entry into the United States. The indictment might have alleged the tendering a bogus identification card; it might have alleged successful clearance of the inspection area; or it might have alleged lying to an inspection officer with the purpose of being admitted. Instead, the indictment merely alleged that Resendiz "attempted to enter" the United States, which simply repeats the ultimate charge against him. A grand jury never passed on a specific overt act, and Resendiz was never given notice of what specific overt act would be proved at trial.

Relying on *Du Bo*, we reversed a conviction for attempted reentry in violation of § 1326, where the indictment failed to explicitly allege specific intent, without inquiring whether the omission prejudiced the defendant. *United States* v. *Pernillo-Fuentes*, 252 F.3d 1030 (9th Cir. 2001). We now hold that failure to allege any specific overt act that is a substantial step toward entry is a fatal defect in an indictment for attempted entry following deportation under 8 U.S.C. § 1326. Accordingly, we reverse the judgment against Resendiz and direct the district court to dismiss the indictment without prejudice to reindictment.

REVERSED and REMANDED.

REAVLEY, Circuit Judge, concurring:

I must concur because of this circuit's precedent, but I fail to see any other reason for this holding. An indictment is constitutionally sufficient if it clearly informs the defendant of the precise offense of which he is

accused so that he may prepare his defense and so that a judgment thereon will safeguard him from a subsequent prosecution for the same offense. 1 CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE & PROCEDURE CRIMINAL § 125 (3d ed. 2000 & Supp. 2005). This indictment does that.

The indictment informs us when and where the defendant intentionally tried to enter the country without consent. The indictment was sufficiently clear to enable Resendiz to prepare his defense. Resendiz raises no contention that he received inadequate notice of the crime charged, nor does he contend that he did not present false identification nor make inaccurate statements at the border, as government agents testified. His contention is only that the indictment failed to charge him with attempting to enter illegally because it does not contain a laundry list of the actions he took in doing so.

It is "inconceivable" that Resendiz would have presented a different defense if the indictment had been more detailed. *United States* v. *James*, 980 F.2d 1314, 1319 (9th Cir. 1992). Likewise, the indictment's reference to a specific date and place where Resendiz attempted to enter the United States is sufficient to allow him to claim double jeopardy if he is again charged with the same crime.

This circuit has incorporated the common law meaning of attempt into the crime of attempted illegal reentry under § 1326 and now requires the elements of that definition, including commission of an overt act, to be in the indictment. However, the legal definition of "attempt" does not change with each indictment; it is a term sufficiently definite in legal meaning to give a defendant notice of the charge against him. *Hamling* v.

*United States*, 418 U.S. 87, 118-19, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974) (finding an obscenity indictment sufficient even though it followed statutory language and did not particularize the various elements required to constitute obscenity). As Professor Wright observed, and numerous courts have echoed, "[t]he test for sufficiency ought to be whether it is fair to defendant to require him or her to defend on the bases of the charge as stated in the particular indictment or information. The stated requirement that every ingredient or essential element of the offense should be alleged must be read in the light of the fairness test just suggested." WRIGHT & MILLER § 125.

The indictment charged Resendiz with "knowingly and intentionally" attempting to enter the country in violation of § 1326 and thus fairly implied that he committed an overt act in doing so. The judge directed the jury to convict Resendiz under § 1326 only if it found beyond a reasonable doubt that he "intentionally committed an overt act that was a substantial step towards reentering the United States." Resendiz was adequately informed of his offense and no unfairness resulted from requiring him to defend on the basis of the charge as stated. The indictment should pass muster and would do so in other circuits. *See, e.g. United States* v. *Blackburn*, 9 F.3d 353 (5th Cir. 1993) (finding indictment for bank fraud sufficient, notwithstanding defendant's contention that it was fatally defective for failure to allege elements "knowingly" and "executes or attempts to execute," because indictment fairly imported all elements and included statutory section number).

While the panel faults the indictment for failure to include more detail, the test is not whether the indict-

ment could have been framed in a more satisfactory manner, but whether it conforms to minimal constitutional standards. *United States* v. *Hinton*, 222 F.3d 664, 672 (9th Cir. 2000). Respectfully but boldly, I caution against the abandonment of common sense such as that illustrated in two cases that bedeviled the Texas courts for years. *See Northern* v. *State*, 150 Tex. Crim. 511, 203 S.W.2d 206 (1947) (holding that an indictment charging that defendant killed the deceased by kicking and stomping her without charging that defendant stomped with his feet was fatally defective as failing to charge the means employed in commission of the offense) *implied overruling recognized by Vaughn* v. *State*, 607 S.W.2d 914 (Tex. Crim. App. 1980); *Gragg* v. *State*, 148 Tex. Crim. 267, 186 S.W.2d 243 (1945) (holding that an indictment charging that defendant killed his wife by drowning her was defective as not alleging the manner and means used to accomplish the drowning).

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Nos. 03-30513, 03-30544

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

TIMOTHY W. OMER, DEFENDANT-APPELLANT

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UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

*v.*

TIMOTHY W. OMER, DEFENDANT-APPELLEE

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Oct. 31, 2005

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Before HAWKINS, THOMAS, and McKEOWN, Circuit Judges.

**ORDER**

The panel has voted to deny the petition for panel rehearing and the petition for rehearing en banc. A judge of the court requested a vote on whether to rehear the case en banc, but the request failed to receive a majority of votes of the nonrecused active judges in favor of en banc rehearing.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

GRABER, Circuit Judge, with whom KOZINSKI, O'SCANNLAIN, BYBEE, CALLAHAN, and BEA, Circuit Judges, join, dissenting from the denial of rehearing en banc.

I respectfully dissent from the court's decision not to take this case en banc. We should take this opportunity to reconsider the rule that our prior precedent required the three-judge panel to apply: *automatic* reversal of any conviction in which the defendant timely, and correctly, objected that an element of the crime was missing from the indictment. *See United States* v. *Du Bo*, 186 F.3d 1177 (9th Cir. 1999) (holding that such a deficiency is not subject to harmless error review). An absolute rule makes no sense. When the defendant has actual notice of the missing element in advance of trial, evidence of the missing element is introduced, the jury is properly instructed about the element, and the finder of fact finds the element beyond a reasonable doubt, the defendant may not have been prejudiced by the omission; reversal should not be compelled. We ought not cling to a rule that drains judicial resources when we can review—indeed, have reviewed, in very similar circumstances—the prejudice caused by the omission of an element from an indictment.

A. *The* Du Bo *decision, establishing the "automatic reversal rule" at issue, rested on three premises.*

The court in *Du Bo* held that, "if properly challenged prior to trial, an indictment's complete failure to recite an essential element of the charged offense is . . . a fatal flaw requiring dismissal of the indictment." 186

F.3d at 1179. We supported that automatic reversal rule with three premises.

The first premise was jurisdictional. We asserted that an indictment that omits an element "does not properly allege an offense against the United States" and thereby "leaves nothing for a petit jury to ratify." *Id.* at 1180 (internal quotation marks omitted). We drew this idea in part from a Fourth Circuit decision holding that harmless error is inapplicable because the omission of an essential element deprives the court of jurisdiction: "The absence of prejudice to the defendant in a traditional sense does not cure a substantive, jurisdictional defect in an indictment." *United States* v. *Hooker*, 841 F.2d 1225, 1232 (4th Cir. 1988) (en banc) (emphasis added); *see also Du Bo*, 186 F.3d at 1180 (citing *Hooker*). We also appeared to hold that the jurisdictional basis for our rule of automatic reversal was supported by *Russell* v. *United States*, 369 U.S. 749, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962), and *Stirone* v. *United States*, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960). *See Du Bo*, 186 F.3d at 1179-80 (relying on those cases).[1]

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[1] Other circuits also have interpreted *Russell* and *Stirone* to require automatic reversal. *See, e.g.*, *United States* v. *Spinner*, 180 F.3d 514, 516-17 (3d Cir. 1999); *Hooker*, 841 F.2d at 1230. Some of those circuits are rethinking the foundations of that position. *See, e.g.*, *United States* v. *Higgs*, 353 F.3d 281, 304-07 (4th Cir. 2003) (relying on later Supreme Court precedents), cert. denied, ___U.S. ___, 125 S. Ct. 627, 160 L. Ed. 2d 456 (2004); *United States* v. *Prentiss*, 256 F.3d 971, 981-85 (10th Cir. 2001) (en banc) (per curiam) (opinion by Baldock, J.) (rejecting applicability of cases, such as *Stirone*, that predated *Chapman* v. *California*, 386 U.S. 18, 23-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)); see also 4 Wayne R. LaFave et al., *Criminal Procedure* § 19.3 (2d ed. 1999 & Supp. 2005).

Second, we said that omissions from a grand jury indictment, unlike omissions from jury instructions, simply are not susceptible to harmless error review. *Du Bo*, 186 F.3d at 1179-80.

Finally, we expressed a desire to give defendants an incentive to bring timely objections. We limited the automatic reversal rule to timely challenges, reasoning that under harmless error review, filing a pretrial motion would be "self-defeating" because the very filing of the motion would demonstrate that the defendant had notice of the missing element. *Id.* at 1180 n.3.

In this case, Defendant Timothy W. Omer raised a timely challenge to the omission of two elements from the indictment against him for bank fraud. We applied the rule of *Du Bo* and reversed Defendant's conviction because of one of those omissions.[2] At the time we

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[2] Defendant was charged with bank fraud in violation of 18 U.S.C. § 1344(1). The indictment alleged that Defendant and an accomplice "knowingly executed or attempted to execute a scheme or artifice to defraud" four financial institutions by way of a check-kiting scheme. The indictment described that "scheme or artifice" in some detail but did not allege that the scheme was *material* to—i.e., "capable of influencing"—the bank's decision to release funds, as required by *Neder* v. *United States*, 527 U.S. 1, 16, 24-25, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The indictment also failed to allege that the financial institutions were federally insured. *See United States* v. *Ali*, 266 F.3d 1242, 1243 (9th Cir. 2001) (" 'Proof of federally-insured status of the affected institution is, for both section 1344 and section 1014, a jurisdictional prerequisite as well as an element of the substantive crime.' " (quoting *United States* v. *Key*, 76 F.3d 350, 353 (11th Cir. 1996) (per curiam))). The district court denied Defendant's pretrial motion to dismiss the indictment for failure to allege those two elements.

After a trial, the jury convicted Defendant. The jury instructions did not mention "materiality," but they did require the jury to find beyond a reasonable doubt that the affected institutions

decided *United States* v. *Omer*, 395 F.3d 1087 (9th Cir. 2005) (per curiam), however, none of the three rationales articulated in *Du Bo* supported continued application of the automatic reversal rule.

B. *Supreme Court precedent does not support the jurisdictional rationale for* Du Bo.

After we issued *Du Bo*, the Supreme Court decided *United States* v. *Cotton*, 535 U.S. 625, 634, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002). *Cotton* directly eliminated the jurisdictional premise for the automatic reversal rule. In *Cotton*, the Court held that an indictment containing the essential elements of the offense is not a jurisdictional prerequisite to a criminal prosecution. *See id.* at 630, 122 S. Ct. 1781 (stating that "defects in an indictment do not deprive a court of its power to adjudicate a case").

The decisions of *Russell* and *Stirone*, which we cited in support of our jurisdictional rationale in *Du Bo*, are distinguishable from *Du Bo* and do not compel the automatic reversal rule. *Russell* and *Stirone* contain strong, general admonitions about protecting the Fifth Amendment right to have a grand jury determine probable cause. *See Russell*, 369 U.S. at 770, 82 S. Ct. 1038 ("To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the

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were federally insured. The panel reversed Defendant's conviction because the indictment omitted the "materiality" element. *United States* v. *Omer*, 395 F.3d 1087, 1089 (9th Cir. 2005) (per curiam) ("[T]he indictment's failure to recite an essential element of the charged offense, namely the materiality of the scheme or artifice to defraud, is a fatal flaw requiring dismissal of the indictment.").

guaranty of the intervention of a grand jury was designed to secure."); *see also Du Bo*, 186 F.3d at 1179-80 (holding that, when "[w]e may only guess whether the grand jury" found probable cause to support the missing element, "[r]efusing to reverse . . . would impermissibly allow conviction on a charge never considered by the grand jury" (citing *Stirone*, 361 U.S. at 219, 80 S. Ct. 270)). But both *Russell* and *Stirone* were concerned with preventing the government from pursuing a theory of the crime not presented to the grand jury; the Court sought to prevent that kind of a substantive "constructive amendment" of the indictment.[3] *See Cotton*, 535 U.S. at 631, 122 S. Ct. 1781 (describing

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[3] In *Russell*, the defendants were convicted under 2 U.S.C. § 192 of willfully refusing to "answer any question pertinent to the question under inquiry" in a congressional hearing. 369 U.S. at 751 & n.2, 752, 82 S. Ct. 1038. The Court reversed their convictions because their indictments did not identify the subject of the pertinent congressional hearings. The Court's chief concern was that one of the defendants had not received notice "of the nature of the accusation against him." *Id.* at 767, 82 S. Ct. 1038. The Court also held that, even if a bill of particulars could provide the defendant with notice, it could not ensure that the grand jury had determined the question under inquiry. *Id.* at 770, 82 S. Ct. 1038. To protect the right to grand jury indictment, the Court applied the "settled rule" that only the grand jury may amend the indictment and, accordingly, reversed the conviction. *Id.* at 770-71, 82 S. Ct. 1038.

In *Stirone*, the defendant was indicted for unlawfully interfering with interstate commerce by obstructing the movement of sand across state lines. 361 U.S. at 213-14, 80 S. Ct. 270. At trial, however, the jury was permitted to convict the defendant for interfering either with the movement of sand or with the movement of steel. *Id.* at 214, 80 S. Ct. 270. The Court held that this alternate factual theory was more than a mere variance in proof; it presented the risk of conviction for an offense different from that which the grand jury had charged. Accordingly, the Court reversed the conviction. *Id.* at 217-18, 80 S. Ct. 270.

*Russell* and *Stirone* as reflecting the "settled proposition of law" that "an indictment may not be amended except by resubmission to the grand jury"). Many cases, however, including the present one, do not involve a new or different theory, so it is questionable whether the Supreme Court's stated rationale must apply across the board to every kind of missing element. *See, e.g., United States* v. *Prentiss*, 256 F.3d 971, 984 n.11 (10th Cir. 2001) (en banc) (per curiam) (opinion by Baldock, J.) (distinguishing the constructive amendment at issue in *Stirone* from the mere failure to allege an essential element because, in the latter case, the indictment "sought to charge Defendant with the sole crime for which the jury convicted him").

Additionally, *Russell* and *Stirone* were decided before *Chapman* v. *California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), in which the Court established that constitutional errors can be harmless. Even more importantly, *Russell* and *Stirone* were decided before *Neder* v. *United States*, 527 U.S. 1, 7-15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), a case that is significant here both for its explanation of "structural error" (discussed below) and its substantive holding that omission of an element of the charged crime from jury instructions can be harmless. *See also United States* v. *Allen*, 406 F.3d 940, 943-45 (8th Cir. 2005) (en banc) (reviewing for harmless error because *Neder's* list of structural errors did not include *Stirone* and because *Neder* held that omissions from jury instructions can be harmless), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Sept. 29, 2005) (No. 05-6764). As our sister circuits have done, we can distinguish *Russell* and *Stirone*.

C. *Our own precedents undermine* Du Bo's *premise that omissions from the grand jury are not susceptible to harmless error review.*

In *Du Bo*, we asserted that omissions from the grand jury are, in general, not proper fodder for harmless error review. We reasoned that assessing grand jury error would require the court to "'guess as to what was in the minds of the grand jury.'" *Du Bo*, 186 F.3d at 1179 (quoting *United States* v. *Keith*, 605 F.2d 462, 464 (9th Cir. 1979)). Our own precedents undermine this rationale.

When defective indictments are challenged for the first time on appeal, our cases do not mandate automatic reversal but, rather, require us to review for plain error. In so doing, we perform a prejudice analysis nearly identical to the analysis that we refused to perform in *Du Bo*. *See United States* v. *Velasco-Medina*, 305 F.3d 839, 847 (9th Cir. 2002) (holding that "any defect in the indictment was harmless"); *United States* v. *Leos-Maldonado*, 302 F.3d 1061, 1064 (9th Cir. 2002) ("*Leos* cannot meet the third condition [of the plain error standard]."). Except for the burden of proof, the third element of the plain error analysis is identical to the harmless error analysis: Both require us to determine whether the error "affect[ed] substantial rights," i.e., prejudiced the defendant. *United States* v. *Jordan*, 291 F.3d 1091, 1095-96 (9th Cir. 2002). *Compare Cotton*, 535 U.S. at 631, 122 S. Ct. 1781 (setting forth the four prongs of plain error review: (1) an error; (2) that is plain; (3) that "*affect[s] substantial rights*"; and (4) that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings" (alteration in original) (emphasis added) (internal quotation marks omitted)), *with* Fed. R. Crim. P. 52(a)

("Any error, defect, irregularity, or variance that does not *affect substantial rights* must be disregarded." (emphasis added)).

In *Velasco-Medina* and *Leos-Maldonado*, we held that omissions from indictments did not affect a defendant's "substantial rights" because the defendant had notice of the missing element, because the weight of the evidence in the trial record established that element, and because the petit jury found the element proved beyond a reasonable doubt. *Velasco-Medina*, 305 F.3d at 847; *Leos-Maldonado*, 302 F.3d at 1064-65. Those holdings make it impossible to conclude that omissions from indictments are exempt from Rule 52(a) because they "are so intrinsically harmful," *Neder*, 527 U.S. at 7, 119 S. Ct. 1827, that they necessarily "affect substantial rights." *See also id.* (describing structural errors as those that "'defy analysis by "harmless error" standards'" (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 309, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991))).

Even more significant than those plain error decisions is a case in which we applied harmless error principles to review an indictment that was challenged in district court after the trial began. *See United States* v. *James*, 980 F.2d 1314, 1319 (9th Cir. 1992) (concluding that "[t]he error in the indictment could have had no effect on the outcome of the trial and was harmless beyond a reasonable doubt" (emphasis added)); *cf. Du Bo*, 186 F.3d at 1180 n.3 (stating that its rule of automatic reversal applies only to timely—that is, pretrial—challenges).

As our cases demonstrate, it simply is not true, as we suggested in *Du Bo*, 186 F.3d at 1179-80, that it is impossible to review an omission for harmlessness. In the untimely challenge cases, we have acknowledged that it

is possible to review the prejudice caused by the omission of an element from an indictment, and in fact we have conducted both harmless error and plain error review.

D. *Encouraging timely objections to indictments is an insufficient justification for retaining* Du Bo's *automatic reversal rule.*

As noted, we have applied harmless error principles to the omission of elements from grand jury indictments in cases where the defendant did not object before trial. If we accept the view that it is possible to review defective indictments for harmless error, the only remaining basis for *Du Bo*'s rule is our desire to give defendants an incentive to bring timely objections. *See Du Bo*, 186 F.3d at 1180 n.3 (giving a practical reason for applying a rule of automatic reversal to timely challenges to indictments).

There is nothing wrong with reviewing a timely argument under a more favorable standard of review than an untimely one; we do it all the time.[4] But the fact that a defendant brings a timely objection, standing alone, cannot be sufficient to create an exemption from the general rule that errors having no effect on the outcome of a proceeding must be disregarded. See Fed. R. Crim. P. 52(a). Structural errors exempt from Rule 52(a) are "basic protections without which . . . no criminal punishment may be regarded as fundamentally

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[4] Indeed, even if we eliminated the rule of automatic reversal, we would continue to review omissions challenged before trial more rigorously. Our established rule for challenges that come at later stages of the district court proceeding is to "liberally construe the indictment in favor of validity." *United States* v. *Chesney*, 10 F.3d 641, 643 (9th Cir. 1993).

fair." *Neder*, 527 U.S. at 8-9, 119 S. Ct. 1827 (internal quotation marks omitted).[5]

Neither the nature of the error, nor its amenability to harmless error review, is affected by the timing of a defendant's challenge. Therefore, the timeliness of a defendant's challenge cannot justify *Du Bo*'s rule of automatic reversal.

E. *Not only are the premises articulated in support of* Du Bo*'s automatic reversal rule insufficient, but Supreme Court precedent suggests the opposite result.*

The Supreme Court held in *Neder* that the omission of an element from jury instructions is subject to harmless error review. The element omitted in *Neder* was materiality, exactly the same as one of the two elements omitted from Defendant's indictment in the present case. In *Neder*, the Court ruled that the omission of the materiality element from the jury instructions was harmless beyond a reasonable doubt because the trial record contained no evidence that could have led a rational jury to find that the defendant's false statements were immaterial. 527 U.S. at 16-20, 119 S. Ct. 1827.

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[5] Even when we have held that an error is subject to a rule of automatic reversal without deeming it "structural," as in *United States* v. *Annigoni*, 96 F.3d 1132, 1144 (9th Cir. 1996) (en banc), we did so because the error was "simply not amenable to harmless-error analysis." In this connection, I also question our holding in *Annigoni*, that even a nonstructural error can be subject to a rule of automatic reversal. Three years after we issued that decision, *Neder* reiterated the Supreme Court's two-option approach and held that, "[f]or all other [nonstructural] errors, reviewing courts must apply" a harmless error analysis. 527 U.S. at 7, 119 S. Ct. 1827 (emphasis added).

The situation in *Neder* presents a close parallel to the omission of an element from an indictment and leaves us with an incongruity: Omission of an element from an indictment is subject to automatic reversal, but omission of the same element from a jury instruction is not. Yet, the right to a grand jury finding of probable cause as to each element of the offense is no more important, no more central to the fundamental fairness of a prosecution, than the right to a petit jury's finding that each element was proved beyond a reasonable doubt. *Cf. Cotton*, 535 U.S. at 634, 122 S. Ct. 1781 ("Respondents emphasize that the Fifth Amendment grand jury right serves a vital function in providing for a body of citizens that acts as a check on prosecutorial power. No doubt that is true. But that is surely no less true of the Sixth Amendment right to a petit jury, which, unlike the grand jury, must find guilt beyond a reasonable doubt." (citation omitted)).

In deciding *Omer*, the panel distinguished *Neder* on the ground that, whereas an error in jury instructions can be assessed with reference to the trial record and the overall fairness of the trial, assessing a grand jury error would require the court to "'guess as to what was in the minds of the grand jury'" and, in any event, could not be remedied by a fair trial. *Du Bo*, 186 F.3d at 1179 (quoting *Keith*, 605 F.2d at 464). As demonstrated above, that reasoning—that there is no way to evaluate, or to cure, any prejudice caused by the omission of an element from an indictment—is undermined by a variety of cases from the Supreme Court, our court, and other circuits in which courts actually do evaluate the prejudice caused by defective grand jury indictments. The cases show that, as a matter of legal doctrine, it is possible (and, indeed, commonplace) to

review the omission of an element from a grand jury's indictment for harmless error.

Under Supreme Court precedent, most errors in grand jury proceedings are reviewed for harmless error. *See Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254, 108 S. Ct. 2369, 101 L. Ed. 2d 228 (1988) ("We hold that, as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants."); *United States* v. *Mechanik*, 475 U.S. 66, 70, 106 S. Ct. 938, 89 L. Ed. 2d 50 (1986) (same).[6] In *Mechanik*, the Court held that, although the error "had the theoretical potential to affect the grand jury's determination whether to indict these particular defendants for the offenses with which they were charged," the defendants' later conviction by a petit jury rendered the error harmless. 475 U.S. at 70, 106 S. Ct. 938; *see id.* (stating that "the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt"). At the very least, *Mechanik* suggests

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[6] The only error in grand jury proceedings that the Supreme Court has considered structural, and thus subject to automatic reversal, is discrimination on account of race, and possibly sex, in the selection of grand jurors. *See Vasquez* v. *Hillery*, 474 U.S. 254, 260-63, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986) (race discrimination); *Bank of Nova Scotia*, 487 U.S. at 257, 108 S. Ct. 2369 (discussing its reversal because of sex discrimination in *Ballard* v. *United States*, 329 U.S. 187, 193, 67 S. Ct. 261, 91 L. Ed. 181 (1946)). In *Mechanik*, the Court interpreted the rule of *Vasquez* as a "prophylactic means of deterring grand jury discrimination in the future" and stated that such "considerations have little force outside the context of racial discrimination in the composition of the grand jury." 475 U.S. at 70 n.1, 106 S. Ct. 938.

that there is nothing about the nature of a grand jury proceeding that precludes harmless error review. In the light of *Mechanik*, if the defendant had actual notice of all elements, all were proved, and the jury was properly instructed, a missing element from a charge in the indictment can be harmless error.

The Supreme Court's cases enumerate a class of "structural errors" that are not susceptible to harmless error review. *See Neder*, 527 U.S. at 9, 119 S. Ct. 1827 (listing such "structural errors"). The Court's decision in *Cotton* makes it extremely difficult to categorize omissions from indictments as structural errors. In *Cotton*, the Court held that one such omission "did not seriously affect the fairness, integrity, or public reputation of judicial proceedings" because the evidence of the missing element was "overwhelming and essentially uncontroverted" at trial. 535 U.S. at 632-33, 122 S. Ct. 1781 (internal quotation marks omitted). In reaching that conclusion, the Court avoided deciding directly whether the omission of an element from an indictment can be reviewed for prejudice. *See Jordan*, 291 F.3d at 1096 n.7 (noting that *Cotton* "might have been significant" to our harmless error analysis had the Supreme Court rested its decision on the "substantial rights" prong of the "plain error review"). But *Cotton* remains relevant to rebut the idea that omission of an element from an indictment always renders a criminal proceeding unfair. *Cf. Neder*, 527 U.S. at 9, 119 S. Ct. 1827 (deciding that omission of an element from jury instructions is not structural error, in part, because in *Johnson* v. *United States*, 520 U.S. 461, 468-69, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997), the Court had decided that the same error did not satisfy the fourth element of the plain error analysis); *United States* v. *Robinson*, 367

F.3d 278, 285 (5th Cir.) ("We have interpreted *Cotton* also to require the application of harmless error review where an indictment is defective and the defendant preserves the error by proper objection."), cert. denied, ___ U.S. ___, 125 S. Ct. 623, 160 L. Ed. 2d 466 (2004).

F. *Other circuits are increasingly abandoning* Du Bo*-like precedents in favor of harmless error review of grand jury omissions.*

Since 2001, six of our sister circuits have held explicitly that they will review defective indictments, challenged at various stages, for harmless error. *See Allen*, 406 F.3d at 945 (reviewing for harmless error an omission challenged at sentencing);[7] *Robinson*, 367 F.3d at 285 (reviewing for harmless error an omission challenged on appeal); *United States* v. *Higgs*, 353 F.3d 281, 304-07 (4th Cir. 2003) (reviewing for harmless error an omission challenged on appeal, relying on *Mechanik* and *Cotton*), cert. denied, ___ U.S. ___, 125 S. Ct. 627, 160 L. Ed. 2d 456 (2004); *United States* v. *Cor-Bon Custom Bullet Co.*, 287 F.3d 576, 580 (6th Cir. 2002) (reviewing for harmless error an omission challenged after the jury was impaneled but before trial began); *Prentiss*, 256 F.3d at 981 (overruling the 10th Circuit's earlier *Du Bo*-like precedents and relying on *Neder* and *Mechanik* to provide harmless error review for an omission challenged on appeal); *United States* v.

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[7] *Allen* was a death penalty case. The indictment was defective because it omitted any statutory aggravating factor. 406 F.3d at 943. The defendant "presciently" objected in the district court. *Id.* The court rejected the defendant's reliance on *Stirone*, pointing out that *Chapman*, *Fulminante*, and *Neder* had changed the landscape. Adopting essentially the analysis contained in this dissent, the court held that the defect in the indictment was subject to harmless error review. *Allen*, 406 F.3d at 945-46.

*Corporan-Cuevas*, 244 F.3d 199, 202 (1st Cir. 2001) (reviewing for harmless error an omission challenged on appeal); see also 4 Wayne R. LaFave et al., *Criminal Procedure* § 19.3(a) (2d ed. 1999 Supp. 2005) ("[B]y a conservative count, at least five federal circuits have abandoned the traditional position mandating automatic reversal, and substituted harmless error review, for appellate review of a timely challenge to an indictment's failure to allege an essential element of the offense."). *But see United States* v. *Pickett*, 353 F.3d 62, 68 (D.C. Cir. 2004) (expressly declining to decide whether harmless error review is available).

G. Omer *cleanly presents an opportunity to reconsider the rule of automatic reversal.*

In this case, Defendant cited the omission of two elements from his indictment in support of his argument for automatic reversal. The first element, materiality, was omitted from Defendant's indictment for bank fraud as well as from the jury instructions at trial. By contrast, only the indictment omitted the second element, the federally insured status of the banks defrauded by Defendant. The jury was properly instructed about the second element at trial and found beyond a reasonable doubt that the financial institutions at issue were federally insured.

The panel's decision addressed only the first omission. Applying *Du Bo*, 186 F.3d at 1179, the panel held that "the indictment's failure to recite an essential element of the charged offense, namely the materiality of the scheme or artifice to defraud, is a fatal flaw requiring dismissal of the indictment." *Omer*, 395 F.3d at 1089. Although the panel reversed solely because of the indictment's failure to allege materiality, the indictment's failure to allege that the banks were federally

insured likewise would have been subject to the rule of automatic reversal because Defendant's challenge was timely. *See James*, 980 F.2d at 1318 (stating that the failure of the indictment in *United States* v. *Coleman*, 656 F.2d 509, 511 (9th Cir. 1981), to allege that the bank was federally insured was cured by the indictment's reference to the statute setting forth that element, and thus did not require automatic reversal, *only* because the defendant's challenge was not timely).

The omission of two elements, one of which was properly instructed and one of which was not, provides a unique opportunity to decide whether those two different, commonly occurring situations require different answers with respect to the availability or application of a harmless error analysis. *See, e.g., Jordan*, 291 F.3d at 1096 (holding that, when drug quantity was neither alleged in the indictment nor proved to the jury beyond a reasonable doubt, the omission was not harmless beyond a reasonable doubt). In my view, the court en banc ought to abolish the rule of automatic reversal only in the most troubling subset of cases: convictions in which the defendant had notice of, and the jury was properly instructed regarding, the element of the crime missing from the indictment.[8]

H. *Conclusion*

I am confident that the indictment's failure to allege that the defrauded banks were federally insured did not prejudice Defendant. He does not dispute that he actually knew that federally insured status was an element of the crime. Moreover, certificates of federally insured status for each bank were provided to Defen-

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[8] My concern, in other words, is not the result in *Omer*, but the analysis that the panel was required to use to reach it.

dant (albeit late), evidence of federal insurance was introduced at trial, the jury was instructed that it must find that the banks were federally insured and, by its verdict, the jury did so find beyond a reasonable doubt. This combination of factors plainly would satisfy the prejudice inquiry that we previously have used in untimely challenge cases and that other circuits have adopted. Nonetheless, *Du Bo* requires reversal for this defect alone.[9]

A result that makes as little common sense as that, on a recurring issue that has prompted a growing consensus in our sister circuits that harmless error review is appropriate, should result in en banc rehearing. Our practice of automatically reversing convictions when a defendant timely objects that an element of the offense was omitted from the indictment is out of step with *Neder*, *Cotton*, *Mechanik*, and our own cases reviewing the prejudice caused by the omission of elements from indictments. Accordingly, I respectfully dissent.

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[9] By contrast, the jury was not instructed on the missing materiality element. In my view, the omission of the element from both the indictment and the instructions was not harmless beyond a reasonable doubt.

No. 05-998

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

v.

JUAN RESENDIZ-PONCE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

# RESPONDENT'S BRIEF IN SUPPORT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the indictment's failure to state essential facts constituting the necessary overt act, coupled with an incorrect explanation of the nature of the charge, deprives the court of the "structure" necessary for harmless error review.

2. Whether, if harmless error analysis is required, review of preserved error should be reviewed in the same manner as unpreserved error.

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## LEGAL ARGUMENT

1. Synopsis Of the Case Below:

Respondent was charged with Attempted Reentry After Deportation in violation of 8 U.S.C § 1326(b)(2). The indictment (Appdx "1") alleged neither an overt act nor any "essential facts" which could constitute such overt act. A necessary element of the offense of attempt is an overt act in furtherance of an intention to reenter the United States after having been deported. As stated in the En Banc decision in United States v. Gracidias-Ulibarry, 231 F.3d 1188, 1196 (9th Cir. 2000): "we hold the elements of the crime of attempted illegal reentry into the United States under 8 U.S.C. § 1326 are: ... (2) that the defendant committed an overt act that was a substantial step toward reentering without consent". (Emphasis supplied).

In accordance with Rule 51(b), and as both authorized and required by Rule 12(b)(3)(B), respondent preserved the claimed error by a timely and proper pretrial motion. He alleged the defect in the indictment and argued that the government had not provided notice of the nature and contents of its allegation.

The government responded that in its view it had complied with Rule 7(c)(1) and stated that: "the overt act of an attempt... is the entry itself". No further information was provided. (Appdx "2").

The Court Of Appeals ruled the overt act "obviously cannot be identified with the ultimate legal question of guilt or innocence". It also rejected the government's claim that the charge of attempt necessarily implied an actual entry. (p.4a of Appdx (A) following Pet For Cert, Resendiz, 425 F.3d at 732). It further alluded to various possible overt acts which the government could have charged but did not charge; namely, "the physical crossing of the border", "the bogus identification card", "lying to an inspection officer".

The Solicitor does not dispute the necessity of an overt act and does not dispute that it was not in the indictment. (See Footnote 3 on page 9 of Pet For Cert). The sole dispute is the appropriate remedy.

2. Legal Argument:

The rule which governs the "Nature and Contents" of an indictment is Rule 7(c)(1) of the Federal Rules Of Criminal Procedure. Neither the government nor the circuit judges dissenting from denial of En Banc review in United States v. Omer, 429 F.3d 835 (9th cir. 2005), have addressed the applicable rule. However, it provides:

> **(c) Nature and Contents.**
> **(1) In General.** The indictment or information must be a plain, concise and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government.
> (Emphasis supplied).

Rule 7(c) represents an embodiment of the constitutional requirement that all essential elements of an offense must be formally charged. United States v. Russell, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962). And, in United States v. Hamling, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974) this Court ruled:

> ... the language of the statute ... must be accompanied by such statement of facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.
> (Internal quotes omitted).
> (94 S.Ct. at 2908).

As far back as 1927, this Court stated the constitutional rule to be that a valid indictment: "shall advise the defendant of the nature and cause of the accusation in order that he may meet it and prepare for trial, and after judgment, be able to plead the record and judgment in bar of a further prosecution for the same

offense". Wong Tai v. United States, 273 U.S. 77, 80-81, 47 S.Ct. 300, 301, 71 L.Ed. 545, 547 (1927).

The rules make a distinction between error which is preserved (Rule 51(b) – Preserving Claimed Error) and error raised for the first time on appeal (Rule 52(b) – Plain Error). The Solicitor seeks to eliminate this distinction and treat all errors alike whether preserved or not, under Rule 52(a) – Harmless Error. Six Circuit Judges are of the same viewpoint as stated sub nom United States v. Omer, 429 F.3d 835 (9th cir. 2005)("That a defendant brings a timely objection, standing alone, cannot be sufficient to create an exemption from the general rule that errors having no effect on the outcome of a proceeding must be disregarded. See Fed.R. Crim.P. 52(a)." Thus, only errors which are "structural" would be exempt from harmless error review regardless of whether or not the error had been preserved. The remaining members of the Ninth Circuit, presumably, are of the opinion that the distinction between preserved and unpreserved error should be continued. That difference of opinion is the essence of the complained-about decision in United States v. Du Bo, 186 F.3d 1177, 1179 (9th Cir. 1999)(constitutional error not subject to harmless error analysis "if properly challenged prior to trial").

The government's position conflicts with this Court's ruling in United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (9th Cr. 1985). There, this



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Court spoke against "unwarranted extension" of Rule 52(b) plain error and spoke of:

> ... the Rule's "careful balancing of our need to encourage trial participant's to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed" (quoting United States v. Frady, 456 U.S. at 162, 102 S.Ct. at 1592). Reviewing courts are not to use the plain error doctrine to consider trial errors not meriting review absent timely objection. (105 S.Ct. at 1046).

The second issue presented is whether the total omission of any essential facts in violation of Rule 7(c)(1) is "structural" or whether it should be reviewed under harmless error standards. The unique feature of this case is that the government not only violated Rule 7(c)(1) but also provided misinformation as to the nature of its allegation. It stated: "the overt act of an attempted reentry is the entry itself". (Resendiz at 732). It was not until the Court Of Appeals issued its ruling that this information was eliminated as a "non-starter" in that it coincides "with the ultimate legal question of guilt or innocence". (Id.).

Respondent submits that trial on a charge that is not made, or is misrepresented, is the type of error that is "fundamentally unfair" and which "infects the framework within which the trial proceeds". (Neder, 119 S.Ct. at 1833). It is the charge that frames the issues to be decided at trial. A defendant's right to be tried only a charge presented by a grand jury and to be accurately

informed of the nature of the allegation are rights that should be classified as "substantial". (U.S. Constitution, Amdt VI).

Ordinary error is often referenced as "trial error". That phrase refers to something that happens at a trial – such as a jury instruction that omits an element as in Neder. At a trial a record is made which is reviewable. The context and therefore the significance of the error can be compared with everything else. Here, however, the government still has not provided information as to what discrete act this court should consider as having been the overt act that resulted in conviction. Granted that respondent did "something". But, there is no assurance that the "something" was in furtherance of the intended attempt to illegally reenter. If the overt act was, for instance, "lying to an inspection officer" respondent may have been attempting to extricate himself because he instantly aroused suspicion and was being referred to secondary inspection. If the overt act was ""tendering of the bogus identification card" respondent may have explained that the documents were valid and he wished to inquire if they could be used for his entry. On the other hand, there are "a number of other acts that the government might have alleged as a substantial step toward entry into the United States". (Resendiz at 733).

Conjecture as to what the overt act might have been, as to respondent's explanation, and as to the uncertainty of how a jury would have resolved the unpresented matters place this case under Sullivan v. Louisiana, 508 U.S. 275, 113

S.Ct. 2078, 124 L.Ed.2d 182 (1993) concerning a constitutionally deficient instruction on reasonable doubt. There, the Court ruled the error to be structural due to the uncertainty of how the jury would have reacted under a proper reasonable doubt instruction. The Court refused to engage in speculation outside of the record as to whether "a jury *would surely have found* petitioner guilty beyond a reasonable doubt" (113 S.Ct. at 2082) and focused inquiry on "whether the guilty verdict actually rendered in *this* trial was surely attributable to the error". (Id.2081).

Here, the government's argument, basically, is that surely Resendiz did something to carry out his intention to illegally reenter the United States albeit that "something" has never been identified. The government's argument asks the Court to engage in off-the-record speculation that amounts to the same type of "directed verdict for the State" that is constitutionally condemned in Sullivan. Here, as in Sullivan, there is no record to review. The error must be deemed to be structural because it is not amenable to quantitative analysis. The misdescription of the burden of proof in Sullivan results in the same type of pure speculation as does the misdescription of the charge in the present case. True, the record contains any number of acts which might have been the necessary overt act – but none have been identified as such. Without knowing what act the government claims is the

overt act there is no structural framework under which the harmlessness of the error could be reviewed.

Finally, the Solicitor insinuates that the admitted error in this case is: "an element of the offense ... inadvertently omitted from a federal indictment, whether because of prosecutorial oversight or simply because of uncertainty as to what constitutes an offense element". (Cert. Pet, p.17). Here, there is nothing uncertain about the overt act being an element. (See, Gracidias, supra). And, there is nothing uncertain about the requirements of Rule 7(c) since the government was provided a timely and appropriate motion detailing its omission of "essential facts" from the indictment. Respondent presents this observation in accordance with Supreme Court Rule 15(2).

## CONCLUSION

In conclusion, this court should grant certiorari and rule: (1) that the distinction between preserved error and plain error is sound; and, (2) that this case lacks the structure and framework necessary for harmless error review.

DATED: March 6, 2006.

Respectfully submitted,

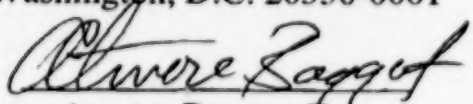
Atmore Baggot

Atmore Baggot, Esq.
CJA Counsel Of Record For Respondent

## CERTIFICATE OF SERVICE

I hereby certify that on or prior to Monday, March 6, 2006, I placed two (2) copies of this Respondent's Brief In support Of Certiorari in the United States mail, postage prepaid,

Solicitor General Of the United States
ATTN: Michael A. Rotker, Esq.
Room 5614, Department Of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001



Atmore Baggot, Esq.

# APPENDIX "1"

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DISTRICT OF ARIZONA
BY _____ DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

United States of America,

Plaintiff,

v.

Juan Resendiz-Ponce,
aka: Juan Ponce Resendiz,

Defendant.

NO. CR03-810-PHX EHC

**INDICTMENT**

VIO: 8 U.S.C. §§ 1326(a) and enhanced by (b)(2)

(Attempted Reentry After Deportation)

THE GRAND JURY CHARGES:

On or about June 1, 2003, JUAN RESENDIZ-PONCE, an alien, knowingly and intentionally attempted to enter the United States of America at or near San Luis in the District of Arizona, after having been previously denied admission, excluded, deported, and removed from the United States at or near Nogales, Arizona, on or about October 15, 2002, and not having obtained the express consent of the Secretary of the Department of Homeland Security to reapply for admission.

In violation of Title 8, United States Code, Sections 1326(a) and enhanced by (b)(2).

A TRUE BILL

John T. Ziglin

FOREPERSON OF THE GRAND JURY
Date: July 30, 2003

PAUL K. CHARLTON
United States Attorney
District of Arizona

Lisa J. Getter for

MARY BETH PHILLIPS
Assistant U.S. Attorney

# APPENDIX "2"

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

United States of America,

Plaintiff,

v.

Juan Resendiz-Ponce,
aka; Juan Ponce Resendiz

Defendant.

No.CR 03-810-PHX-EHC

**GOVERNMENT'S RESPONSE TO MOTION TO DISMISS INDICTMENT**

The United States of America, by and through undersigned counsel, hereby responds to defendant's motion to dismiss the indictment. In support of this response, the government provides the following Memorandum of Points and Authorities.

## MEMORANDUM OF POINTS AND AUTHORITIES

An indictment must allege the elements of the offense charged and the facts which inform the defendant of the specific offense with which he is charged. Pernillo-Fuentes, 252 F.3d 1030, 1031 (9th Cir. 2001). In construing the language of the indictment courts must be guided by common sense and practicality. United States v. Christopher, 700 F.2d 1253 (9th Cir. 1983). Attempted entry in violation of 8 U.S.C. 1326 essentially requires two elements: (1) the specific intent to reenter without consent; and (2) an overt act that was a substantial step towards reentry. United States v. Leos-Maldonado, 302 F.3d 1061, 1063 (9th Cir. 2002).

The defendant relies on United States v. Gracidias-Ulibarry in his argument that the indictment failed to allege specific intent since it stated that he "knowingly and intentionally" attempted to enter the United States, 231 F.3d 1188, 1196 (9th Cir. 2000). In Gracidias-Ulibarry, the Court found constitutional error when the district court failed to instruct the jury on the specific intent element of reentry. Id. at 1198. There, the trial court instructed the jury that it should convict Gracidias if it merely found that he "attempted to reenter the United States" instead of finding that he "intended" to enter the United States. Id. at 1191. The defendant also relies on Pernillo-Fuentes which held that an indictment that alleged only that the defendant "attempted to enter the United States" was fatally flawed. 252 F.3d at 1032. The facts of these cases are distinguishable from the instant case. Here, in contrast to mere attempt, the indictment alleges that the defendant "knowingly and intentionally" attempted to enter the United States.

Furthermore the indictment does allege the specific intent required in Gracidias-Ulibarry. The terms knowingly and intentionally constitute willfulness. United States v. Morales, 108 F.3d 1031, 1036 (9th Cir. 1997). "Willful" in the criminal context includes a specific intent to do an act forbidden by law. United States. v. Drew, 722 F.2d 551(9th Cir. 1983). In this case, the indictment states that the defendant "knowingly and intentionally" attempted to enter the United States and thus specific intent is alleged.

The defendant also alleges that the indictment failed to allege an overt act. Attempted reentry is not an attempt to commit an independently described offense, in the sense in which the word "attempt" is ordinarily used in criminal law, but it is the actual reentry into the United States. United States. v. Corrales-Beltran, 192 F.3d 1311, 1319 (9th Cir. 1999). Attempted entry occurs when a previously deported alien makes an effort or tries to reenter the United States. United States v. Leos-Maldonado, 302 F.3d 1061, 1064 (9th Cir. 2002). It is the act of crossing the boundary line into the United States. Id. In this case, the indictment alleges that the defendant attempted to enter the United States at or near San Luis, Arizona on or about October 15, 2002. Since the overt act of an attempted entry crime is the entry itself and the indictment stated the date and place of the defendant's reentry, the indictment sufficiently alleges an overt act.

BEST AVAILABLE COPY

**Conclusion**

For the foregoing reasons the defendants motion to dismiss the indictment should be denied.

Respectfully submitted this 17th day of November, 2003.

PAUL K. CHARLTON
United States Attorney
District of Arizona

RAYNETTE M. LOGAN
Assistant U.S. Attorney

Original filed and copy of the foregoing mailed this 17th day of November 2003, to:

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1615 N. Delaware Drive
Apache Junction, Arizona 85220-1804

Supreme Court, U.S.
FILED
MAR 23 2006
OFFICE OF THE CLERK

(3)

No. 05-998

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

JUAN RESENDIZ-PONCE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
*Solicitor General*
*Counsel of Record*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

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# In the Supreme Court of the United States

No. 05-998

UNITED STATES OF AMERICA, PETITIONER

*v.*

JUAN RESENDIZ-PONCE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

Respondent urges this Court to grant certiorari and then affirm the Ninth Circuit's rule that the omission of an element of an offense from a federal indictment cannot constitute harmless error. Br. 10. Respondent is correct that the question presented merits this Court's review. As explained in the petition, the question presented is the subject of a clear and entrenched circuit conflict; is a recurring and important question in federal prosecutions; and is squarely presented in this case. Respondent does not challenge any of those propositions, but instead argues only that the court of appeals correctly held, following its earlier decision in *United States* v. *Du Bo*, 186 F.3d 1177 (9th Cir. 1999), that the omission of an offense element from a federal indictment constitutes structural error necessiating automatic reversal. Respondent's various arguments on the merits do not detract from the need for this Court's review, and are in any event unsound.

1. As discussed at greater length in the petition for certiorari, the decision of the court of appeals in this case conflicts with the decisions of the majority of courts of appeals to have considered the issue, which have held that the omission of an offense element from a federal indictment is amenable to harmless-error analysis. See Pet. 8-9. The decision below is also inconsistent with this Court's precedents on harmless-error review—most notably, this Court's decision in *Neder* v. *United States*, 527 U.S. 1 (1999), which held that a similar omission from the petit jury's instructions can constitute harmless error. See Pet. 9-16.

Faced with this overwhelming weight of authority, respondent contends only that *Neder* is distinguishable because it involves "trial error," rather than an error that occurs before the grand jury. Br. 8. Respondent, however, overlooks that this Court has repeatedly applied harmless-error analysis to errors that occur at the grand jury stage. See *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988); *United States* v. *Mechanik*, 475 U.S. 66, 70 (1986); *United States* v. *Lane*, 474 U.S. 438, 448 n.11 (1986); *United States* v. *Hasting*, 461 U.S. 499, 509-510 n.7 (1983). If anything, the fact that the error at issue in this case occurred at the grand jury stage renders it *more* susceptible, not less, to harmless-error review, insofar as it is the petit jury, not the grand jury, that provides the ultimate protection for the accused. See *United States* v. *Cotton*, 535 U.S. 625, 634 (2002). Because the omission of an offense element from an indictment is closely analogous to the failure to obtain a finding by the petit jury on an offense element at trial, this Court's decision in *Neder* compels the con-

clusion that the former type of error, like the latter, can be reviewed for harmlessness.[1]

2. Respondent suggests (Br. 5) that the government's argument overlooks Federal Rule of Criminal Procedure 7(c)(1), which requires, *inter alia*, that an indictment contain "a plain, concise, and definite written statement of the essential facts constituting the offense charged." As respondent seemingly recognizes (Br. 5), however, that rule merely codifies the constitutional requirement that a federal indictment allege every element of an offense—and the related, but conceptually distinct, constitutional requirement that an indictment provide sufficient detail to inform the defendant of the nature of the charge against him. See, *e.g.*, 4 Wayne R. LaFave et al., *Criminal Procedure* § 19.2(a), at 746 (2d ed. 1999).[2] To the extent this case involves an error un-

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[1] Respondent relies (Br. 8-9) on this Court's decision in *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). *Sullivan*, however, is readily distinguishable. In *Sullivan*, the petit jury was given a constitutionally defective reasonable-doubt instruction, which undermined *all* of the jury's findings. *Id.* at 281. Here, by contrast, there is no dispute that the grand jury returned an indictment containing all but one of the elements of the offense of attempted unlawful reentry under 8 U.S.C. 1326(a), see Pet. 3, and that the petit jury returned a guilty verdict after being properly instructed concerning all of the elements of that offense, see Pet. 4.

[2] As noted in the petition (at 9-10 n.4), this case does not implicate the latter constitutional requirement. To the extent that respondent now contends (Br. 8) that the indictment failed to provide sufficient detail to place him on notice of the overt act on which the government would rely in prosecuting him for attempted unlawful reentry, that claim lacks merit, because a claimed lack of notice is readily amenable to review for prejudice, and respondent fails to establish that any such deficiency caused prejudice to his defense. See Pet. 10 n.4. Indeed, given that the indictment specified that the charged attempted unlawful reentry occurred on a single, identified date and the proof entailed a

der Rule 7(c)(1) as well as a constitutional error, respondent does not demonstrate how that fact bears on whether harmless-error analysis is appropriate here.

3. Respondent contends (Br. 6) that the government "seeks to eliminate [the] distinction" between preserved and unpreserved errors. That contention lacks merit. In *Cotton*, this Court held that the failure to allege a sentence-enhancing fact in a federal indictment (and to obtain a finding on that fact from the jury at trial) did not constitute reversible error under the four-part plain-error test applicable when an objection has not been preserved. 535 U.S. at 634. Specifically, the Court concluded that the fourth component of that test was not satisfied because any error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 632-633. Although that conclusion strongly suggests that such an error is amenable to harmless-error analysis when an objection *has* been preserved, see Pet. 12-13, it does not follow that *Cotton* would somehow be supplanted, and the distinction between preserved and unpreserved errors eradicated, if the Court were to agree that an indictment error can be harmless. Instead, *Cotton* would continue to govern the plain-error analysis in cases in which an objection has not been preserved—and the harmless-error standard of *Chapman* v. *California*, 386 U.S. 18 (1967), would apply in cases in which an objection has been preserved. Cf. *United States* v. *Olano*, 507 U.S. 725, 734-735 (1993) (noting distinctions, including burden of proof, between plain-error and harmless-error cases).

4. Finally, respondent seemingly attaches significance (Br. 10) to the fact that, under Ninth Circuit law

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single effort at the border to gain admission, Pet. 2-3, it is difficult to see how petitioner could possibly have been prejudiced.

at the time of the indictment, it was clear that the commission of an overt act was an element of the offense of attempted unlawful reentry. Respondent does not contend, however, that the rule he advocates would apply only in cases in which a prosecutor fails to allege what is indisputably an offense element, and not in cases in which there is uncertainty as to what constitute the elements of the given offense. In any event, because the omission of an offense element from a federal indictment does not "infect the entire trial process," *Brecht* v. *Abrahamson*, 507 U.S. 619, 629-630 (1993), or "necessarily render a trial fundamentally unfair," *Rose* v. *Clark*, 478 U.S. 570, 577 (1986), it should not automatically require reversal in either situation. And because the government has conceded, for purposes of this petition (see Pet. 9 n.3), that the indictment in this case was constitutionally deficient because it did not allege one of the elements of the charged offense,[3] this case constitutes a suitable—indeed, optimal—vehicle for consideration of the recurring and important question presented.

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[3] Specifically, the government does not dispute, for purposes of the petition, that the commission of an overt act was an element of the offense of attempted unlawful reentry, see *United States* v. *Gracidas-Ulibarry*, 231 F.3d 1188, 1196 (9th Cir. 2000) (en banc), and that the indictment failed to allege that element implicitly by alleging that respondent had engaged in an "attempt[]" to reenter unlawfully, see Pet. App. 2a. Because the indictment did allege that respondent had acted "knowingly and intentionally" in attempting to reenter the United States, see *ibid.*, this case does not implicate the validity of the Ninth Circuit's further holding that another element of the offense of attempted unlawful reentry is that the defendant have acted with "a specific intent to enter illegally," *Gracidas-Ulibarry*, 231 F.3d at 1192.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
*Solicitor General*

MARCH 2006

Supreme Court, U.S.
FILED
JUN 2 3 2006
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(6)

No. 05-998

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

JUAN RESENDIZ-PONCE

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: Feb. 8, 2006
CERTIORARI GRANTED: Apr. 17, 2006

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-10302

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

JUAN RESENDIZ-PONCE, DEFENDANT-APPELLANT

**DOCKET ENTRIES**

| DATE | PROCEEDINGS |
|---|---|
| | * * * * * |
| 9/2/04 | Filed original and 15 copies Appellant Juan Resendiz-Pounce opening brief (Informal: n) 23 pages and five excerpts of record in 1volumes; served on 8/25/04 [04-10302] (ft) |
| 1/31/05 | Filed original and 15 copies of appellee USA's 21 pages brief and 5 supplemental excerpts of record in 1 volume; served on 1/28/05 [04-10302] (ba) |
| | * * * * * |
| 6/14/05 | ARGUED AND SUBMITTED TO Alfred T. GOODWIN, Thomas M. Reavley, Johnnie B. RAWLINSON [04-10302] (lb) |
| | * * * * * |
| 10/11/05 | FILED OPINION: REVERSED and REMANDED (Terminated on the Merits after |

| DATE | PROCEEDINGS |
|---|---|
| | Oral Hearing; Reversed; Written, Signed, Published. Alfred T. GOODWIN, author; Thomas M. Reavley, concurring; Johnnie B. RAWLINSON.) FILED AND ENTERED JUDGMENT. [04-10302] (ba) |

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Criminal Docket No. 2:03-cr-00810-EHC-ALL

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

JUAN RESENDIZ-PONCE, DEFENDANT

**DOCKET ENTRIES**

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | * * * * * |
| 07/30/2003 | 11 | INDICTMENT by USA attorney Mary Beth Phillips. Counts filed against Juan Resendiz-Ponce (1) count(s) 1 (former emp) (Entered: 07/31/2003) |
| | | * * * * * |
| 11/04/2003 | 25 | MOTION to dismiss indictment [25-1] by Juan Resendiz-Ponce (former emp) (Entered: 11/04/2003) |
| | | * * * * * |
| 11/17/2003 | 28 | RESPONSE by pla to motion to dismiss indictment [25-1] by Juan Resendiz-Ponce (former emp) (Entered: 11/19/2003) |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | * * * * * |
| 11/24/2003 | 33 | (FILED: 11/25/03) MINUTES: before Judge Earl H. Carroll . Ct Rptr: Candy Potter Interpreter: Louis Velasco/Spanish. mtn hrg held; denying motion to strike (B)(2) allegation [26-1] by Juan Resendiz-Ponce, taking under advisement on 11/24/03 the motion to dismiss indictment [25-1] by Juan Resendiz-Ponce as to question of if dft was lawfully deported; denied w/respect to identifying something as an overt act per se and as to specific intent re indictment [33-1]; ORD proposed jury instructions be filed by 11/28/03 at 4:00 PM; trial date of 12/2/03 is affirmed (former emp) Modified on 12/01/2003 (Entered: 12/01/2003) |
| 11/26/2003 | 34 | JURY instructions by dft Juan Resendiz-Ponce as to dft Juan Resendiz-Ponce (former emp) (Entered: 12/02/2003) |
| | | * * * * * |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 12/02/2003 | 37 | (FILED: 12/2/03) MINUTES: before Judge Earl H. Carroll. Ct Rptr: Candy Potter Interpreter: VanDuzer/Sporrer/ Spanish. DAY 1 JURY TRIAL if not previously denied, denying motion to strike (B)(2) allegation [26-1] by Juan Resendiz-Ponce; ORD filing Henthorn rpt from gov under seal; trial begins, voir dire begins as to Juan Resendiz-Ponce, jury impaneled Juan Resendiz-Ponce (1) count(s) 1; opening stmts; gov directed to file their case law by 4:30 tonight; contd to 9:00 AM 12/3/03 [37-4] (former emp) (Entered: 12/04/2003) |
| | | * * * * * |
| 12/03/2003 | 40 | (FILED: 12/5/03) MINUTES: before Judge Earl H. Carroll . Ct Rptr: Candy Potter Interpreter: Lita VanDuzer/ Spanish. DAY 2 JURY TRIAL ORD denying dft obj to admission of exh 7 absence of jury; gov rests; dft oral mtn for jgm of acquittal purs to rule 29 argued and denied absence of |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | jury; defense rests; closing arguments; jury deliberates and returns verdict; Juan Resendiz-Ponce (1) count(s) 1 found guilty,; sentencing set for 2:00 2/23/04 for Juan Resendiz-Ponce [40-3] (former emp) (Entered: 12/05/2003) |
| | | * * * * * |
| 12/03/2003 | 46 | Court's given JURY instructions as to dft Juan Resendiz-Ponce (former emp) (Entered: 12/05/2003) |
| | | * * * * * |
| 05/24/2004 | 60 | (FILED: 5/24/04) MINUTES: before Judge Earl H. Carroll . Ct Rptr: Candy Potter Interpreter: Cristina Sporrer/ Spanish.; sentencing held as to Juan Resendiz-Ponce [60-2] (LCF) (Entered: 05/25/2004) |
| 05/24/2004 | 61 | JUDGMENT and Commitment issued as to Juan Resendiz-Ponce, sentencing for Juan Resendiz-Ponce (1) count(s) 1. Committed to BOP for a term of SIXTY THREE (63) MOS, followed by supervised release |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | for a term of THIRTY SIX (36) MOS; Court recommends that the dft be placed in an institution in the southwestern part of the United States where there are education programs and vocational training available for his participation; S/A: $100, Case closed ; ordered by Judge Earl H. Carroll (LCF) (Entered: 05/25/2004) |
| 05/26/2004 | 62 | NOTICE OF APPEAL by dft Juan Resendiz-Ponce from District Court judgment, re: conviction and sentence (cc: 9CCA/ EHC/pts/BAS/USAO/dfns and 1 copy for dft) (REW) (Entered: 05/26/2004) |

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

---

No. CR 03-810-PHX EHC

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

JUAN RESENDIZ-PONCE, AKA: JUAN PONCE RESENDIZ,
DEFENDANT

---

[Filed: July 30, 2003]

---

**INDICTMENT**

VIO: 8 U.S.C. §§ 1326(a) and enhanced by (b)(2)
(Attempted Reentry After Deportation)

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THE GRAND JURY CHARGES:

On or about June 1, 2003, JUAN RESENDIZ-PONCE, an alien, knowingly and intentionally attempted to enter the United States of America at or near San Luis in the District of Arizona, after having been previously denied admission, excluded, deported, and removed from the United States at or near Nogales, Arizona, on or about October 15, 2002, and not having obtained the express consent of the Secretary of the Department of Homeland Security to reapply for admission.

In violation of Title 8, United States Code, Sections 1326(a) and enhanced by (b)(2).

A TRUE BILL

/s/ JOHN T. ZIEGHER
JOHN T. ZIEGHER
Foreperson of the grand jury
Date: July 30, 2003

PAUL K. CHARLTON
United States Attorney
District of Arizona

/s/ [ILLEGIBLE]
MARY BETH PHILLIPS
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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No. CR 03-00810 PHX EHC

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

JUAN RESENDIZ-PONCE, DEFENDANT

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[Filed: Nov. 4, 2003]

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**DEFENDANT'S MOTION TO DISMISS INDICTMENT**

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**THE INDICTMENT IS DEFECTIVE BECAUSE IT DOES NOT ALLEGE OR STATE ANY FACTS CONCERNING THE OVERT ACT NECESSARY FOR THE "ATTEMPT" PRONG OF § 1326.**

Pursuant to Rule 12(b)(2) defendant moves to dismiss the indictment due to insufficiency of allegation. Under Rule 7(c), which pertains to the nature and content of an Indictment, the requirement is that the indictment contain "a plain, concise and definite written statement of the essential facts constituting the offense charged". This motion is timely because "a claim of defective indictment can be raised at any time" although the standard of review will vary. *United States v. James*, 980 F.2d 1310, 1314 (9th Cir. 1992). A pretrial challenge to an indictment is both timely and proper. *United States v. Leos-Maldonado*, 302 F.3d 1061, 1064 (9th Cir. 2000).

The most authoritative decision on the attempt aspect of § 1326 is the En Banc decision in *United States v. Gracidias-Ulibarry*, 231 F.3d 1188 (9th Cir. 2000). It ruled that Congress intended to incorporate the common law meaning of "attempt" into § 1326. It ruled:

> . . . we hold the elements of the crime of attempted illegal reentry into the United States under 8 U.S.C. § 1326 are: (1) the defendant had the purpose, i.e. conscious desire, to reenter the United States without the express consent of the Attorney General; (2) *that the defendant committed an overt act that was a substantial step toward reentering without that consent.* . . . .

(231 F.3d at 1196). (Emphasis supplied).

Then, in *United States v. Pernillo-Fuentes*, 252 F.3d 1030 (9th Cir. 2001) the circuit ruled that an indictment which failed to include essential facts regarding the element of the required mental state, which is specific intent, was defective. There, the timely filed pretrial motion argued: "the indictment failed to allege the specific intent required in 'attempt' crimes." (252 F.3d at 1032). The ruling was:

> An indictment's failure to "recite an essential element of the charged offense is not a minor or technical flaw . . . but a fatal flaw requiring dismissal of the indictment." *United States v. DuBo*, 186 F.3d 1177, 1179 (9th Cir. 1999). . . . The district court should dismiss the indictment on remand.

(252 F.3d at 1032).

The element of an overt act in furtherance of the attempted illegal reentry is just as much an element of the offense as is the mental state and needs to be

included in the indictment together with the specific intent.

Also, in *United States v. Leos-Maldonado*, 302 F.3d 1061 (9th Cir. 2000) a defective indictment argument was presented late in the appellate process pointing out that an element was not alleged in the indictment. The court ruled the omission to be a "fatal flaw requiring dismissal" and said:

> . . . we might have been persuaded to set aside Leos' conviction had he timely raised a challenge to the indictment in the district court . . .

(302 F.3d at 1064).

See also *United States v. Arbelaez*, 812 F.2d 530, 534 (9th Cir. 1987) which holds that an essential element of the crime of attempt is an overt act.

THEREFORE, the indictment is defective and must be dismissed for failure to allege an essential element, an overt act, or to state the essential facts of such overt act.

DATED: October 30, 2003.

/s/ ATMORE L. BAGGOT
ATMORE L. BAGGOT
Attorney For Defendant JUAN RESENDIZ-PONCE

Copy delivered on
November 4, 2003,
to office of:

Ms. Raynette Logan, Esq.
Assistant U.S. Attorney, 12th Fl.

/s/ ATMORE L. BAGGOT
ATMORE L. BAGGOT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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No. CR 03-810-PHX-EHC

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

JUAN RESENDIZ-PONCE, AKA; JUAN PONCE RESENDIZ, DEFENDANT

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[Filed: Nov. 17, 2003]

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**GOVERNMENT'S RESPONSE TO MOTION TO DISMISS INDICTMENT**

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The United States of America, by and through undersigned counsel, hereby responds to defendant's motion to dismiss the indictment. In support of this response, the government provides the following Memorandum of Points and Authorities.

**MEMORANDUM OF POINTS AND AUTHORITIES**

An indictment must allege the elements of the offense charged and the facts which inform the defendant of the specific offense with which he is charged. *Pernillo-Fuentes*, 252 F.3d 1030, 1031 (9th Cir. 2001). In constructing the language of the indictment courts must be guided by common sense and practicality. *United States v. Christopher*, 700 F.2d 1253 (9th Cir. 1983). Attempted entry in violation of 8 U.S.C. 1326 essentially requires two elements: (1) the specific intent to reenter without consent; and (2) an overt act

that was a substantial step towards reentry. *United States v. Leos-Maldonado*, 302 F.3d 1061 (9th Cir. 2002).

The defendant relies on *United States v. Gracidias-Ulibarry*, in his argument that the indictment failed to allege specific intent since it stated that he "knowingly and intentionally" attempted to enter the United States, 231 F.3d 1188, 1196 (9th Cir. 2000). In *Gracidias-Ulibarry*, the Court found constitutional error when the district court failed to instruct the jury on the specific intent element of reeentry. *Id.* at 1198. There, the trial court instructed the jury that it should convict Gracidias if it merely found that he "attempted to reenter the United States" instead of finding that he "intended" to enter the United States. *Id.* at 1191. The defendant also relies on *Pernillo-Fuentes* which held that an indictment that alleged only that the defendant "attempted to enter the United States" was fatally flawed. 252 F.3d at 1032. The facts of these cases are distinguishable from the instant case. Here, in contrast to mere attempt, the indictment alleges that the defendant "knowingly and intentionally" attempted to enter the United States.

Furthermore the indictment does allege the specific intent required in *Gracidias-Ulibarry*. The terms knowingly and intentionally constitute willfulness. *United States v. Morales*, 108 F.3d 1031, 1036 (9th Cir. 1997). "Willful" in the criminal context includes a specific intent to do an act forbidden by law. *United States v. Drew*, 722 F.2d 551 (9th Cir. 1983). In this case, the indictment states that the defendant "knowingly and intentionally" attempted to enter the United States and thus specific intent is alleged.

The defendant also alleges that the indictment failed to allege an overt act. Attempted reentry is not an attempt to commit an independently described offense, in the sense in which the word "attempt" is ordinarily used in criminal law, but it is the actual reentry into the United States. *United States v. Corrales-Beltran*, 192 F.3d 1311, 1319 (9th Cir. 1999). Attempted entry occurs when a previously deported alien makes an effort or tries to reenter the United States. *United States v. Leos-Maldonado*, 302 F.3d 1061, 1064 (9th Cir. 2002). It is the act of crossing the boundary line into the United States. *Id.* In this case, the indictment alleges that the defendant attempted to enter the United States at or near San Luis, Arizona on or about October 15, 2002. Since the overt act of an attempted entry crime is the entry itself and the indictment stated the date and place of the defendant's reentry, the indictment sufficiently alleges an overt act.

**Conclusion**

For the foregoing reasons the defendant's motion to dismiss the indictment should be denied.

Respectfully submitted this 17th day of November, 2003.

PAUL K. CHARLTON
United States Attorney
District of Arizona

/s/ RAYNETTE M. LOGAN
RAYNETTE M. LOGAN
Assistant U.S. Attorney

Original filed and copy of the foregoing mailed this 17th day of November 2003, to:

Atmore L. Baggot
1615 N. Delaware Drive
Apache Junction, Arizona 85220-1804

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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No. CR 03-810 PHX-EHC

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

JUAN RESENDIZ-PONCE, DEFENDANT

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Nov. 24, 2003
2:55 p.m.

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING

BEFORE: THE HONORABLE EARL H. CARROLL, JUDGE

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APPEARANCES:

FOR THE PLAINTIFF:

U.S. ATTORNEY'S OFFICE
BY: RAYNETTE LOGAN, ESQ.
40 North Central Avenue
Suite 1200
Phoenix, Arizona 85004

FOR THE DEFENDANT:

ATTORNEY AT LAW
BY: ATMORE L. BAGGOT, ESQ.
1615 North Delaware Drive
Apache Junction, Arizona 85220
Phoenix, Arizona 85004

* * * * *

[2]

THE CLERK: Criminal 2003-810, United States of America versus Juan Resendiz-Ponce, on or defendant's motion to strike (b)(2) allegation and to dismiss Indictment.

MS. LOGAN: Good afternoon, Your Honor, Raynette Logan for the United States.

MR. BAGGOT: And Atmore Baggot for the defendant, who is also present.

THE COURT: All right. We have the motion to dismiss, your contention being that there have to be some overt acts alleged for the attempt, Mr. Baggot?

MR. BAGGOT: Yes, sir, that's the motion.

THE COURT: Right.

MR. BAGGOT: In the Pernillo case the Court of appeals dismissed a jury verdict, trial which had gone to a jury, because the defendant had timely protested about the adequacy of the allegation of the Indictment. Their ruling there, of course, had to do with the element of specific intent, the defendant's mental state. This motion is a logical extension of that argument.

The other element of an attempt is that the defendant must actually do something, they can't just talk, they must actually commit an overt act. We are entitled to know what that overt act—

THE COURT: What it is alleged—what is the act alleged in the Indictment?

[3]

MR. BAGGOT: There isn't any. There isn't any, that's our problem.

THE COURT: Do they allege that he attempted to reenter the United States?

MR. BAGGOT: That is the crime. But what is the overt act?

THE COURT: Was he in the United States when he was arrested?

MR. BAGGOT: Not legally, no, sir.

THE COURT: Well, he was in the United States.

MR. BAGGOT: Not under Pacheco Medina. He was under the control of the Immigration agency.

THE COURT: Well, for purposes of attempt—

MR. BAGGOT: Physically he had crossed the border, yes.

THE COURT: He was in the United States.

MR. BAGGOT: At the turnstile.

THE COURT: Okay. All right. Well, I have read the case Gracidas-Ulibarry. And I have not found any case, Mr.—and then I'll ask the government, but Mr. Baggot, where there was reference to a particular overt act, and that there was no overt act alleged, and therefore an Indictment—a case was dismissed.

As a matter of fact, the ones that have discussed that particularly say there was no overt act alleged.

[4]

MR. BAGGOT: But still, that's an element of the offense and it has to be alleged.

THE COURT: I see. Notwithstanding what the Ninth Circuit has said in a number of cases where they found that beyond the attempt and being in the United States, that there was any overt act required?

MR. BAGGOT: But he wasn't in the United States legally, he's under Pacheco Medina.

THE COURT: I see. Well, in any event, Miss Logan.

MR. BAGGOT: Yes, Your Honor.

The overt act is the attempt to enter in this case. The allegation of attempted entry is the actual act of attempting to enter the United States. And by allowing—by alleging the time and the place of the Indictment, it gives enough specificity to the defense to be able to challenge the Indictment.

So in an attempted illegal reentry, the actual attempt to enter is the overt act itself in these cases.

THE COURT: Well, I think it's Gracidas-Ulibarry that has five elements that are supposed to be alleged. And I have not found any case dealing with an overt act that wasn't alleged or some specific event.

MR. BAGGOT: Rule 7 says there have to be allegations of fact, not just conclusions of law, but facts alleged. Tell us what it is.

[5]

THE COURT: Have you raised this proposition in other district courts here in the District of Arizona?

MR. BAGGOT: Well, sir, I had a pro se defendant who tried to argue it to a jury, that's where this argument came from.

THE COURT: Well—

MR. BAGGOT: That was a problem.

THE COURT: Yes. Well, I find, Mr. Baggot, that the Indictment alleges a reentry—attempted reentry. That the defendant was in the United States, had entered the United States albeit illegally. And that being here is sufficient to advise him and you as his lawyer of what it is he's charged with. And the Indictment is not any mystery or concealed from him specifically what he is charged with.

So the motion is denied with respect to identifying something as an overt act per se.

You have another argument?

MR. BAGGOT: Yes sir. Our second motion is to strike the (b)(2) allegation in the Indictment. The fact of whether a deportation preceded or was subsequent to a criminal conviction is something that does not appear on the fact of the conviction. It's the temporal sequence—

THE COURT: Doesn't appear on the face of the conviction. What conviction?

MR. BAGGOT: They're alleging a (b)(2). That means [6] that he was deported subsequent to an aggravated felony. But the subsequent to is a matter of fact.

THE COURT: Pardon me. The Indictment alleges that he was—previously entered and was deported October 15, 2002; right?

MR. BAGGOT: Right.

THE COURT: Okay. Now what else do you want?

MR. BAGGOT: There are no facts which the Government can prove to the jury that the deportation was subsequent to a conviction for an aggravated felony so as to put this under paragraph (b)(2). That's a fact that doesn't appear—

THE COURT: Has the Ninth Circuit addressed that argument particularly and rejected it?

MR. BAGGOT: You have.

THE COURT: They specifically rejected it; right?

MR. BAGGOT: You did, yes.

THE COURT: No, the Ninth Circuit in a published opinion.

MR. BAGGOT: What opinion was that? I'm not aware that they've ever considered this argument.

THE COURT: How about Pacheco Zepeda?

MR. BAGGOT: That's an Almendarez argument.

THE COURT: Right.

MR. BAGGOT: Almendarez is the law of the circuit, we understand that. But the fact of the time sequence, whether [7] the conviction was subsequent to or preceded deportation is nowhere on the fact of the State Court conviction.

THE COURT: Well, I think the rule in Pacheco Zepeda is controlling, and cites Almendarez, that illegal entry following deportation need not be treated as an

element of the offense that must be charged in the Indictment and proved beyond a reasonable doubt.

MR. BAGGOT: That's limited to the conviction.

THE COURT: So in any event, your motion there is denied. Any others?

MR. BAGGOT: Not at the moment.

THE COURT: Well, let's see here. I thought I had a third one.

MR. BAGGOT: Well, you have a motion in limine by the Government, which I request more time to respond to.

THE COURT: No, you had one, didn't you, about specific intent?

MR. BAGGOT: Regarding the Indictment, Rule 7 states that essential facts must be alleged. And we don't have any essential facts.

THE COURT: Well, didn't you claim—didn't you argue particularly that specific intent had to be alleged in the Indictment?

MR. BAGGOT: Well, I said there has to be essential facts under Rule 7. There's no facts.

[8]

THE COURT: Well, is specific intent what you were talking about? I thought it was.

MR. BAGGOT: Yes, but what are the facts of the specific intent? Thee are not specific facts, just the legal conclusion that he entered intentionally, that's alleged.

THE COURT: What should they say?

MR. BAGGOT: The facts.

THE COURT: What fact?

MR. BAGGOT: Whatever he did.

THE COURT: What fact? It says the fact is that he entered intentionally. That is a fact.

MR. BAGGOT: Well, it's a legal conclusion.

THE COURT: All right. That motion is denied as well.

Now the Government has a motion to strike —what's the Government's motion?

MS. LOGAN: Your Honor, the Government's—

THE COURT: And I would say incidentally too, that the Indictment in this case, unlike the Indictment in—you're familiar with Pernillo-Fuentes?

MR. BAGGOT: Pernillo?

THE COURT: Pernillo.

MR. BAGGOT: That's the one that was dismissed because it didn't allege a specific intent.

THE COURT: Right. And there all the Indictment said [9] was he attempted to enter, and it didn't say intentionally.

MR. BAGGOT: Right. But it didn't raise the issue of the overt act.

THE COURT: We're now talking about specific intent and alleging that rather than some overt act.

In any event, I think Pernillo-Fuentes was a different fact situation. The Indictment in that case simply said attempting to enter. It didn't express the nature of the intention, that it had to be intentionally. They don't use the words "specific intent" in any place, et cetera.

And so that motion is denied as well, that part of your motion.

Now, that leaves us with the Government's motion?

MS. LOGAN: Yes. The Government requests that this Court preclude the defense from arguing to the jury the lawfulness of the deportation. If the defense is going to argue that, they have to argue it to the Court to decide whether or not that prior deportation was lawful.

THE COURT: And are you intending to do that, Mr. Baggot?

MR. BAGGOT: Well, Your Honor, we're not going to argue about the lawfulness of it, that would have to be to the Court. But still, the fact of the deportation is a matter of fact.

* * * * *

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF ARIZONA CRIMINAL
MINUTES-MOTIONS

CR-03-810-PHX-EHC DATE: 11/24/03
Case Number

Hon: Earl H. Carroll Judge # 7014

USA v. Resendiz-Ponce, Juan
Last Name First Name Middle Name

DEFENDANT:
X Present __ Not Present __ Released X Custody _ Writ

Deputy Clerk:
Roberta Hightower Crt Rptr/ECR: Candy Potter

U.S. Atty:
Raynette Logan Dft Atty: Atmore Baggot, appointed

Intrptr: Louis Velasco Language: Spanish

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___ Dft not appearing, on mot of US Atty, order bond revoked/forfeited and B/W issued.

**PROCEEDINGS**: X Open Court ___ Chambers ___ Other

03:05 Hearing held on the Dft's Motion to Dismiss Indictment [25-1] and to Strike (b)(2) allegation [26-1]. Argument heard,

**IT IS ORDERED** denying the motion to dismiss indictment with respect to identifying something as an overt act per se. As to specific intent regarding the Indictment, that motion is denied as well. As to the question of if the defendant was lawfully deported, the issue is taken under advisement.

**IT IS FURTHER ORDERED** denying the Motion to Strike (b)(2) allegation [86-1].

**IT IS FURTHER ORDERED** any proposed jury instructions shall be filed by Friday, 11/28/03 at 4:00p.m. The Court will

fax proposed panel questionnaire tomorrow, 11/25/03. The trial date of 12/2/03 is affirmed.

Any plea proceeding must be scheduled with the court prior to 4:00 p.m., Monday 12/1/03.

Excludable delay purs to 18:3161 _____ to commence on ___ _____ and terminate on _____

Copies to:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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No. CR 03-810 PHX EHC

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

JUAN RESENDIZ-PONCE, DEFENDANT

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Filed: Dec. 2, 2003
8:59 a.m.

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

JURY TRIAL
VOLUME 1

BEFORE: THE HONORABLE EARL H. CARROLL,
JUDGE

---

APPEARANCES:

FOR THE PLAINTIFF:

U.S. ATTORNEY'S OFFICE
BY: RAYNETTE LOGAN, ESQ.
40 North Central Avenue
Suite 1200
Phoenix, Arizona 85004

FOR THE DEFENDANT:

ATTORNEY AT LAW
BY: ATMORE L. BAGGOT, ESQ.
1615 North Delaware Drive
Apache Junction, Arizona 85220

* * * * *

[91]

MS. LOGAN: The Government calls Nancy Vela. Agent Vela, will you please approach the witness stand?

THE CLERK: Please raise your right hand.

(NANCY VELA, GOVERNMENT WITNESS, SWORN)

THE CLERK: Would you please state your legal name for the record and spell your last name?

THE WITNESS: Nanny Elena Vela, V-E-L-A.

THE CLERK: Thank you. Please be seated.

DIRECT EXAMINATION

BY MS. LOGAN:

Q. Agent Vela, where do you work?

A. At the San Luis, Arizona port of entry.

Q. And who do you work for?

A. The Immigration and Naturalization Service.

Q. And what are some of your duties there?

A. I inspect the people that are coming from a foreign country.

Q. And how long have you worked there?

A. Approximately about three years.

Q. And are you a Spanish speaker?

A. Yes.

Q. Are you fluent?

A. Yes.

Q. Did you encounter the defendant on June 1st of 2003?

[92]

A. Yes.

Q. And what was your first contact with the defendant?

A. He was coming through the pedestrian area.

Q. And what was he attempting to do?

A. He was trying to—

MR. BAGGOT: Objection, Your Honor, calls for a legal conclusion.

THE COURT: Describe the association of the area, and let's proceed.

Q. BY MS. LOGAN: Can you describe the area that you were working in?

A. Yes. There's an entrance to the United States where people who are not in a vehicle come across walking. And there is a turnstile before you come into the United States. And that's where I met the subject.

Q. And what were your duties at the turnstile?

A. Inspect the people coming from a foreign country.

Q. And what happened when the defendant approached you?

A. He presented a resident alien card.

Q. And who was the resident alien card for?

A. It was for Antonio Resendiz.

Q. And did the photo resemble the defendant?

A. No.

Q. Did you ask for another form of identification?

A. Yes.

[93]

Q. And did he present another form of identification?

A. Yes.

Q. And what was that?

A. An Arizona driver's license.

Q. And what was the name on the driver's license?

A. Antonio Resendiz.

Q. And did that photograph look like the defendant?

A. No.

Q. And what happened next?

A. I proceeded to ask him where he was going. And he stated that he wanted to go to Calexico.

Q. And is Calexico in the United States?

A. Yes.

Q. Approximately how far from San Luis is Calexico?

A. I want to say about an hour.

Q. And what happened next?

A. I proceeded to refer him to the INS secondary office.

Q. And at the point where you're at the turnstile and the defendant approached you, is that on U.S. property?

A. Yes.

Q. About how far did the defendant have to walk on U.S. property to get to that turnstile?

A. Approximately about 100 feet.

MS. LOGAN: Could the witness have Exhibits 1 and 2?

Q. BY MS. LOGAN: Can you look at Exhibit 1, please? Do you [94] recognize that?

A. Yes.

Q. What is it?

A. It's a permanent resident card.

Q. And how do you recognize it?

A. The subject presented this at the time of applying for admission.

Q. And what is the name on that card?

A. Antonio Resendiz.

Q. And is that in substantially the same condition as when you took it from the defendant?

A. Yes.

MS. LOGAN: Your Honor, the Government moves to introduce Exhibit 1.

MR. BAGGOT: Exhibit 1 is admitted.

THE COURT: Exhibit 1 is admitted.

Q. BY MS. LOGAN: Could you look at Exhibit 2, please?

A. Yes.

Q. Do you recognize that exhibit?

A. Yes.

Q. And what is it?

A. It's an Arizona driver's license.

Q. And how do you recognize it?

A. After the subject presented the resident alien card I asked him for another I.D. and he presented the Arizona [95] driver's license.

Q. And what is the name on that driver's license?

A. Antonio Resendiz.

Q. And is it in substantially the same condition as when you seized it from the defendant?

A. Yes.

MS. LOGAN: Your Honor, the Government moves to admit Exhibit 2.

MR. BAGGOT: No objection.

THE COURT: Exhibit 2 is admitted.

Q. BY MS. LOGAN: Will you place Exhibit 1 back in the bag? And is the person who presented those two forms of identification to you here today in the courtroom?

A. Yes.

Q. And can you identify him, please?

A. Yes. He's sitting next to—he's wearing a green shirt with the orange on the front.

MS. LOGAN: Thank you.

No further questions, Your Honor.

THE COURT: Mr. Baggot.

CROSS-EXAMINATION

BY MR. BAGGOT:

Q. Agent Vela, you stated that you first encountered the defendant at the turnstile; is that correct?

A. Yes.

* * * * *

[100] that you had contact with the defendant?

A. Yes.

Q. So would you say that what you wrote in that memo is probably more accurate than what you remember today?

A. Yes.

Q. And also Calexico, is that in the United States?

A. Yes.

Q. And the two forms of identification that the defendant presented to you, they did not have the defendant's photograph on them, did they?

A. No.

MS. LOGAN: Thank you. No further questions, Your Honor.

THE COURT: You may step down. Thank you very much.

Next witness.

MS. LOGAN: Your Honor, the Government calls Sean Bly.

Agent Bly, will you please approach the witness stand?

THE CLERK: Please raise your right hand.

(SEAN BLY, GOVERNMENT WITNESS, SWORN)

THE CLERK: Would you please state your name for the record and spell your last name?

THE WITNESS: Sean Richard, B-L-Y.

THE CLERK: Thank you. Please be seated.

[101]

DIRECT EXAMINATION

BY MS. LOGAN:

Q. Agent Bly, where do you work?

A. San Luis port of entry.

Q. And who do you work for?

A. I work for the Customs and Border Protection.

Q. And how long have you worked for them?

A. For seven-and-a-half years.

Q. And what are some of your duties there?

A. I enforce the laws of the INA.

Q. Do you speak Spanish?

A. Yes, I do.

Q. For how long have you spoken Spanish?

A. For about eight years.

Q. Did you encounter the defendant on June 1st of 2003?

A. Yes, I did.

Q. And how so?

A. He was referred to the CBP office.

Q. What is that?

A. That is the Customs and Border Protection office.

Q. And what were your duties that day?

A. Secondary officer.

Q. And what does a secondary officer do?

A. We handle mostly the case work that is brought before us.

Q. And what is some of that work?

[102]

A. People who have violated the INA. For example, false claims, false documents, claiming to be U.S. citizens.

Q. Did you have an opportunity to interview the defendant on that day?

A. Yes, I did.

Q. Did he answer any of your questions?

A. He—he refused to answer any of my questions when it came to the sworn statement, but he did answer my questions when it came to the back page of the IA-67 A and B.

Q. What is that form that you're referring to?

A. That is a sworn statement.

Q. And did the defendant answer your question as to where he was going?

A. Yes, he did.

Q. And where did he say he was going?

A. He said he was going to Phoenix, Arizona to visit his children.

Q. And do you recognize anyone in the courtroom here today that you interviewed on that date?

A. Yes, I do.

Q. Who is that?

A. The gentleman sitting over there to the right.

Q. And is that the defendant that you interviewed that day?

A. That is the man.

MS. LOGAN: Thank you, Your Honor.

* * * * *

[126]

MS. LOGAN: The Government calls Anthony Consolino.

THE CLERK: Please raise your right hand.

(ANTHONY CONSOLINO, GOVERNMENT WITNESS, SWORN)

THE CLERK: And your name, please, for the record.

THE WITNESS: Anthony Consolino.

THE CLERK: Could you spell that, please?

THE WITNESS: C-O-N-S-O-L-I-N-O.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MS. LOGAN:

Q. Where do you work?

A. I work in Phoenix, Arizona.

Q. And who do you work for?

A. I work for the U.S. Immigration and Customs Enforcement.

Q. And what are some of your duties there?

A. I am a Special Agent, and I conduct investigations of Immigration violations.

Q. Do you speak Spanish?

A. I do speak Spanish, but I am not a native speaker.

Q. How did you learn to speak Spanish?

A. I learned through listening to radio and in school, and just casual conversation.

Q. Did you interview the defendant on October 15th of 2002?

A. I did.

Q. And did you interview him in Spanish?

[127]

A. I don't remember if it was in Spanish or English.

Q. If the defendant spoke Spanish, would it have been in Spanish?

A. It would have been.

Q. And who else was present at the interview?

A. At the interview there was another witness that was present.

Q. And who was that person?

A. That was—judging from the signature, it looks like Special Agent David Scanlon.

Q. And as part of your duties do you commonly speak to and interview people in Spanish?

A. Usually I do.

Q. And how long have you been doing these interviews in Spanish?

A. For the better of three years.

Q. And did you eventually type up an affidavit for the defendant?

A. I did.

Q. Is that Exhibit 7 in front of you?

A. It is.

Q. And is that the type of affidavit?

A. That is the affidavit; correct.

Q. And do you recognize it?

A. I do.

[128]

Q. How do you recognize it?

A. I recognize it because my signature is on it.

Q. And is that a true and correct copy of the original?

A. It appears to be.

Q. What is the date on that exhibit?

A. The date is October 15th, 2002.

Q. And what is the name of the person being interviewed on that exhibit?

A. The name is Juan Resendiz-Ponce.

MS. LOGAN: Your Honor, the Government moves to admit Exhibit 7 into evidence.

MS. BAGGOT: Your Honor, the defendant objects for the reasons previously stated.

THE COURT: Exhibit 7 is admitted. The objection is overruled.

Q. BY MS. LOGAN: Do you check the defendant's identification prior to the interview and the signature on the affidavit?

A. Normally that's the case.

Q. So you confirm that this is the person you're being interviewed—that's being interviewed, and you also watch him signing that affidavit?

A. That's correct.

Q. Now let's look at Exhibit 7. The defendant—did the defendant sign the document?

A. He did.

[129]

Q. And you said there was a witness to the signing of the document?

A. That's correct.

Q. Is that person another agent?

A. He is.

Q. And what did the defendant say with regard to his name? What does the exhibit say with regard to his name?

A. With regard to his name, it states that he is a native and citizen of Mexico.

Q. What is his name?

A. Is name is Juan Resendiz-Ponce.

Q. And where was he born?

A. In the country of Mexico.

Q. And when was that?

A. That was on August 21st, 1971.

Q. And is there an alien number on that document?

A. Yes, there is.

Q. And what is the alien number?

A. The alien number is A73-934-853.

MS. LOGAN: Thank you. No further questions.

CROSS-EXAMINATION

BY MR. BAGGOT:

Q. Agent, prior to eliciting the statement from the defendant, did you give him the Miranda warnings?

A. No, I did not.

* * * * *

[133]

MS. LOGAN: Government calls Miguel Rodriguez. Would you please approach the witness stand?

THE CLERK: Please raise your right hand.

(MIGUEL RODRIGUEZ, GOVERNMENT WITNESS, SWORN)

THE CLERK: Would you please state your name for the record and spell your last name?

THE WITNESS: Miguel Rodriguez, R-O-D-R-I-G-U-E-Z.

THE CLERK: Thank you, sir. Please be seated.

DIRECT EXAMINATION

BY MS. LOGAN:

Q. Agent Rodriguez, where do you work?

A. At the Florence Immigration Facility.

Q. And who do you work for?

A. Immigration and Customs.

Q. And how long have you worked for them?

A. Just over eight years.

Q. And what are your duties with the INS?

A. Custody and control of aliens in the Immigration custody, transportation duties, just general care.

Q. On October 15, 2002, did you encounter the defendant?

A. Yes, ma'am.

Q. And how did you encounter the defendant?

A. I was assigned to transportation duties that day, and I encountered him at the Florence detention facility. I was assigned to transport the alien.

[134]

Q. And what happens at a border when you execute a Warrant of Deportation?

A. Upon arrival to the border I witness all the aliens cross the border.

Q. Do you confirm the warrants that you have, the names of the warrants to the people being deported?

A. Yes, ma'am.

Q. And how do you do that?

A. We take roll call several times before we leave the facility, and after the aliens are boarded on the bus.

Q. And did you record in writing that you witnessed the defendant going across the border from the United States into Mexico?

A. Yes, ma'am.

Q. And how is this information recorded?

A. It's on the departure witness on the I-205.

Q. Could you look at Exhibit 4, please?

MS. LOGAN: Could the witness have Exhibit 4?

Q. BY MS. LOGAN: Do you recognize that?

A. Yes ma'am.

Q. And how do you recognize it?

A. It's the I-205 Warrant of Removal, deportation.

Q. How do you recognize it?

A. By reading it.

Q. Does it have your signature on it?

[135]

A. Yes, it does, ma'am.

Q. And is there also a picture on that document?

A. Yes, ma'am.

Q. And who is the picture of?

A. Mr. Resendiz-Ponce.

Q. And did you—you said you signed that document; right?

A. Yes ma'am.

Q. Prior to signing that document, did you verify that the photo matched the person being deported?

A. Yes, ma'am, several times.

Q. And is there any way for a person to escape prior to walking across the border?

A. No, ma'am.

Q. And when you signed that warrant, does that mean you watched them walk across the border?

A. Yes. I signed the warrant after the departure is witnessed.

Q. And how does it say that the person who is deported got across the border.

A. Afoot.

Q. And that means?

A. That means he walked across the border.

Q. According to Exhibit 4, when was Mr. Resendiz-Ponce deported?

A. October 15th, 2002.

[136]

Q. And where was he deported to?

A. To Mexico.

Q. And is there an alien number on that document?

A. Yes, ma'am.

Q. What is the alien number?

A. A73-934-853.

MS. LOGAN: Thank you. No further questions. Your Honor.

CROSS-EXAMINATION

BY MR. BAGGOT:

Q. Mr. Rodriguez, you stated you transported the defendant. How did you do that?

A. In a bus.

Q. And how—what size bus is this?

A. It's a MCI bus. It's about 49 seats capacity.

Q. And was the bus full on this day, October 15th?

A. I can't recall.

Q. How often do you drive the bus down there?

A. Five times a week.

Q. Is it normally full or close to full?

A. Just depends. Sometimes it is, sometimes, just depends.

Q. Do you remember Mr. Resendiz-Ponce personally or just because you signed this document, the I-205?

A. I just remember signing this document, because that's my signature. I don't remember him personally.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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No. CR 03-810-PHX-EHC

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

JUAN RESENDIZ-PONCE, DEFENDANT

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Dec. 3, 2003
9:31 a.m.

---

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JURY TRIAL
VOLUME 2

BEFORE: THE HONORABLE EARL H. CARROLL, JUDGE

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APPEARANCES:

FOR THE PLAINTIFF:

U.S. ATTORNEY'S OFFICE
BY: RAYNETTE LOGAN, ESQ.
40 North Central Avenue
Suite 1200
Phoenix, Arizona 85004

FOR THE DEFENDANT:

ATTORNEY AT LAW
BY: ATMORE L. BAGGOT, ESQ.
1615 North Delaware Drive
Apache Junction, Arizona 85220

* * * * *

[171] that it's—when you come to the port of entry and claim to be a United States citizen, you're attempting to reenter the United States, and what flows from that.

So the motion is denied.

Anything else? That's it?

All right. Now, is—do you have any witnesses, Mr. Baggot?

(Discussion off the record between Mr. Baggot and the defendant)

MR. BAGGOT: No, the defendant will exercise his right to remain silent.

THE COURT: All right. Very well then. When the jury is back in, we will—the Government will rest—or has rested. I will ask you, Mr. Baggot, you can say no witnesses. And then we will give the jury a coffee break while we discuss the instructions.

And I will need to have one instruction changed as well, the fact that—well, I think the set I did provide said the defendant didn't testify.

So in any event, we'll review the instructions with the defendant present. And so we will get the jury back in now for these purposes, and then go ahead.

(Jury in at 10:51 a.m.)

THE COURT: Very well. The Government having rested, Mr. Baggot, any witnesses?

[172]

MR. BAGGOT: The defense will rest also, Your Honor.

THE COURT: All right. Very well.

Members of the jury, this an up and down morning for you. I now need to talk with the lawyers about the instructions. I have prepared instructions, have given then to the lawyers, and so they have a chance to comment or object to them. And I need to have them in a form—in a final form, because the next part of the case would be—will be, when you're back again, that I have to read the instructions to you before the final arguments of counsel. And so that requires that I have them—give the lawyers a chance to object to them.

And so we will do that. It's ten minutes of 11:00, and so we will take a recess until a quarter after 11:00. It will take me about five minutes—well, ten minutes, I suppose, to read the instructions to you then. And I'm sure we will then proceed at least with the Government's opening final argument before the lunch break.

So again now, don't talk about the case or discuss it or worry about the problems that we have sometimes in utilizing you, as I said, most effectively.

So we'll take a recess now so I can meet with the lawyers about the instructions. Please be back in the jury room at a quarter after 11:00, and we will go ahead, as I've said, at that time.

* * * * *

[187] doubt.

A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence.

If after a careful and impartial consideration of all the evidence you are not convinced beyond a reason-

able doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

The defendant is charged with attempted reentry as a deported alien, in violation of Section 1326(a) of Title 8 of the United State Code. In order for the defendant to be found guilty of that charge, the Government must prove each of the following elements beyond a reasonable doubt:

First, the defendant is an alien;

Second, the defendant was reported—deported, removed f om the United States on or about October 15, 2002, at or near Nogales, Arizona;

Third, the defendant thereafter attempted to enter the United States in the District of Arizona at or near San Luis, Arizona on or about June 1, 2003, but intentionally committing an overt act that was a substantial step towards [188] reentering the United States;

Fourth, the defendant had not obtained the express consent of the Secretary of Homeland Security to reapply for admission.

An alien is a person who is not a natural born or naturalized citizen of the United States.

An act is done intentionally if a defendant is aware of the act and does not act through ignorance, mistake or intent. You may consider the evidence of a defendant's words, acts or omissions, along with all the other evidence, in deciding whether the defendant acted intentionally.

Intent ordinarily need not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer a person's intent from the surrounding circumstances.

Those are the instructions that I have for you now. I'll have a few additional instructions to read to you after the final arguments.

The Government having the burden of proof in the case, makes an opening final argument. Defense counsel has the opportunity to make a final argument, and then the Government can make a rebuttal or closing argument.

Miss Logan.

MS. LOGAN: The evidence in this case is straightforward and clear. On June 1st, 2003, the defendant [189] intentionally attempted to enter the United States after having been previously deported, and after having not received permission to reeenter the United States.

The elements are found on the instruction number 12, which I will read a portion of.

The defendant is an alien. The defendant was deported from the United States on October 15th, 2002, at or near Nogales, Arizona. The defendant thereafter attempted to enter the United States in the District of Arizona at or near San Luis, Arizona on or about June 1st, 2003, by intentionally committing an overt act that was a substantial step towards reentering the United States.

And finally, the defendant had not obtained the express consent of the Secretary of the Department

of Homeland Security to reapply for admission into the United States.

The evidence supports all four elements in this case.

The first element that the defendant is an alien. You will read the sworn testimony given by the defendant at his deportation hearing whereby the defendant stated that he is a Mexican citizen. You also heard an agent testify and read from that transcript earlier.

You will also have an opportunity to look at a sworn statement given by the defendant to Agent Consolino in this case on October 15, 2002, where the defendant admitted he was born in Mexico, and that he was a Mexican citizen.

[190]

You will also have an opportunity to review the Order of Deportation by an Immigration Judge finding that the defendant needed to be deported to Mexico.

The second element, that the defendant was deported from the United States on October 15th, 2002, at or near Nogales, Arizona. You will have an opportunity to see a Warrant of Removal and Deportation, which has a picture of the defendant and his fingerprint on it, wherein the defendant was deported through Nogales, Arizona.

You also heard the testimony of Agent Rodriguez, who witnessed the defendant crossing the border from the United States into Mexico, and that he signed—Agent Rodriguez signed the warrant to show that the defendant had crossed from the United States into Mexico at Nogales.

And finally, you will also have an opportunity to read the warning given to the alien when he was removed and deported, which was signed by the defendant, and has his fingerprint on it, on October 15th 2002. That is Exhibit 5. In it it says that, in accordance with the provisions of Section 212(a)(9) of the Immigration and Nationality Act you are prohibited from entering, attempting to enter, or being in the United States for a period of 20 years from the date of your departure from the United States because, after having been previously excluded, deported or removed from the United States you have been found to have reentered the United States [191] illegally and have had the prior order reinstated under Section 241(a)(5) of the Act. That is dated October 15, 2002.

The evidence of the defendant attempted to enter the United States at San Luis on June 1st of 2003. You heard the testimony of Agent Vela who said the defendant approached her at the port of entry in San Luis, Arizona. That port of entry is 100 feet within the United States border. She said that the defendant presented her with two false identifications and told her that he was going to Calexico, which is one hour away from San Luis in the United States.

You also heard the testimony of Agent Bly. Agent Bly told you that he interviewed the defendant, and the defendant told him that he was on his way to Phoenix, Arizona.

You also heard the testimony of Agent Laskey, who took the fingerprints of the defendant while he was in secondary inspection at the San Luis port of entry.

And finally, the element that the defendant did not receive permission to reenter the United States.

You will see a certification of nonexistence of record. What that means is that there was an INS employee who searched all the records, including computerized records, and found that the defendant did not reapply—did not apply—did not receive permission to reapply into the United States.

You also heard the testimony of Agent Martin, who had the official A-file of the defendant with him. The official [192] A-file contains all documents of all contacts that the defendant had with Immigration Services regarding Immigration matters. And the agent testified that there is no such record of any application to reapply for entry into the United States.

You also heard from two experts. The fingerprint expert testified that the fingerprint card taken during the defendant's detention on June 1st, 2003, which has a picture of the defendant on it, matches the fingerprints taken during his deportation on October 15, 2002, on the Warrant of Removal, as well as the warning that was given to the defendant during that prior removal, which also has his signature on it.

The handwriting expert testified that the sworn statement that was taken from—taken by Agent Consolino of the defendant where he admits his Mexican citizenship, the signature of that document matches the document—the warning given to the alien during his prior deportation, which also has his fingerprint on it.

The evidence in this case is clear, the defendant, a Mexican citizen, intentionally attempted to enter the United States near San Luis, Arizona on June 1st, 2003. The defendant approached the San Luis port of entry. When he reached the turnstile he presented a false document, a permanent resident alien card, to Agent

Vela. Agent Vela said [193] that the photograph on the card was not him and asked for another form of identification. He presented a driver's license, which also did not contain a photo of the defendant on the driver's license. And also both of those identifications had the name Antonio Resendiz, which is not the name of the defendant in this case.

He was then escorted to secondary where he was further processed.

At the point when the defendant reached the turnstile of the port of entry he was 100 feet into the United States. This and the fact that he tried to enter with two false forms of identification is clear evidence that the defendant took a substantial step towards reentering the United States.

Also, the defendant told two separate agents that he was intending to go further into the United States. He told Agent Vela that he was going to Calexico. He told Agent Bly that he was going to Phoenix. By his own admission the defendant intended to enter the United States and go further than the San Luis port of entry.

And certainly the defendant did not obtain permission from the Secretary of the Department of Homeland Security to reapply for admission into the United States.

For the above reasons, the Government urges you to find this defendant guilty as charged.

THE COURT: Thank you very much.

[194]

Mr. Baggot.

MR. BAGGOT: Ladies and gentlemen, thank you for your attention and service in this case.

The Judge has just instructed you on several matters, one of which is that you must decide the case solely on the evidence before you. He's also instructed that you may draw reasonable inferences from the evidence before you, and that circumstantial evidence counts just as well as direct evidence.

However, one thing you should not do is guess. Or if there is something that was not presented, you shouldn't just suppose that it exists even though it was not presented. In effect, what you must do is evaluate the evidence in this case and see if the Government has provided evidence on each and every one of the elements which they have the constitutional duty to supply to you.

I'd like to discuss some of those elements right now.

First of all, one of the elements is that the defendant is an alien. The instructions go on to say that an alien is a person who is not a natural born or naturalized citizen of the United States.

The best the Government has shown in this case is that he was a citizen of Mexico. The Court has admitted a statement by the defendant from last year, October of last year, in which he stated that he was a citizen of Mexico.

[195]

That does not necessarily mean that he's not also a citizen of the United States. We submit that there is a deficiency in the evidence. The Government has not

discussed whether or not this individual is a United States citizen.

Is there any possibility of that? Well, he did present a valid green card with his name on it. The name—you will have the opportunity to review the evidence. You will see the name is not Juan, it is Antonio. But he did have a valid card. And he did present a valid driver's license, even though, again, his name was on it, but the first name was different.

If you read the transcript of the proceedings before the Immigration Judge back in 1996, you will see that he's been here since 1988, and that he is eligible for various forms of relief in the Immigration process. The Government has not negated or presented evidence to you he is not a citizen, and therefore that he is an alien.

Another element which the Government has not shown you is that this is what is meant by an intentional attempt. The Judge provides a definition of intentional, meaning that if the defendant is aware of the act and does not act through ignorance, mistake or accident. Well, obviously the Government never did address the situation of whether this was a mistake or not. All we know is that he presented a valid LPR card, legal permanent resident card, which is known as a [196] green card. And number two, a valid driver's license. His name was on both of those. We don't know where they came from. We don't know where—how he got those.

We don't know what his state of mind was. The Government never did address the question of whether or not this was a mistake or ignorance or an accident. Perhaps he picked up the wrong card on the way out of the house or whatever happened. I don't know. We

don't know. That wasn't presented to you. That is a glaring deficiency in the evidence.

And of course the jury's job is not to decide what really happened. That's the agent's job. But to decide whether the evidence presented supports the charge as you're given to it.

We submit the Government never did address the subject of ignorance, mistake or accident, how he got the card, what his state of mind was, anything of that nature.

There's also a question in this case of whether he attempted to enter. As you recall, the first agent said that as soon as she looked at his green card—actually it wasn't his, at the green card, she knew at that point in time that there was—something was amiss, simply because the picture on the card doesn't match what he looks like. At that point in time he didn't attempt to enter, he didn't attempt to do anything. He told the agent where he was going. He told one [197] agent Phoenix, the other agent Calexico. But he never did attempt to deceive them.

When he was told that the card wasn't good, he didn't attempt to enter at all, he just accepted—he answered the questions truthfully where he was going and he didn't attempt to enter.

Also, the word "deportation" is not defined by the Court. The word "deportation" is something that is a matter of fact, it's an element of this case. You will have to determine whether there was an actual deportation or not in this case.

And bear in mind, one of the last instructions I think the Judge will give you, is that is you wish to communicate you may send a letter to the Judge and he

will meet with us and you will get an answer. I don't know how edifying the answer will be, but you will get an answer. So you have that option to you.

If you read the transcript of what happened in the agency when he was before the Immigration Judge, there are various possibilities. And that is on page 4 of the transcript. It is possible there could be a suspension of it, an asylum application, a volunteer departure. The Government did not negate or explain to you what happened, whether any of those possibilities occurred.

So as you go through this case, please bear in mind [198] that your duty as jurors is to see if the Government has produced evidence to support its charge.

We submit, for the reasons that I've just explained to you, there are holes in the evidence, they have not sustained their burden of proof beyond a reasonable doubt, and you should find the defendant not guilty.

Again, thank you for your service. I'm sure you all had other things to do yesterday and today. Of course the judge did, I did, and everybody else did. So thank you for your service.

THE COURT: Miss Logan.

MS. LOGAN: The identification cards presented at the port of entry were not the defendant's. The picture does not match the defendant. The name on those cards are Antonio Resendiz, which is an alias. The defendant, when he was asked while his fingerprints were being taken what his name was, his name is Juan Resendiz-Ponce. Those I.D. cards were not his. They were not valid. And there is no way to say that he is a U.S. citizen because he was carrying those cards. They belong to someone else.

And the fact that he was at the port of entry, that he was within the United States, 100 feet, that is an attempted entry, because he was within the United States already.

The elements are clear. The evidence is clear. You [199] should find the defendant guilty beyond a reasonable doubt.

Thank you.

THE COURT: All right. Just a few additional instructions, members of the jury.

When you retire, you should elect one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict, whether guilty or not guilty, must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you've considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

Your verdict must be based solely on the evidence and on the law as I've given it to you in these

in instructions. However, nothing that I've said or done is intended to suggest

* * * * *

[EXHIBIT 1]

CASE NO. CR 03-810-PHX-EHC

UNITED STATES OF AMERICA

VS. JUAN RESENDIZ-PONCE

PLAINTIFF'S EXHIBIT 1

DATE _____ IDEN.

DATE _____ EVID.

BY _____
Deputy Clerk

AO 386

BEST AVAILABLE COPY



# PERMANENT RESIDENT CARD

NAME RESENDEZ, ANTONIO

INS A# [Redacted]

Birthdate Category Sex

[Redacted] W16 M

Country of Birth

Mexico

CARD EXPIRES 12/19/08

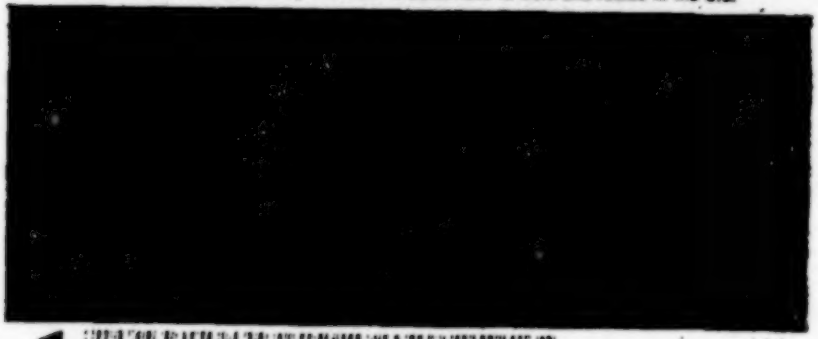
Resident Since 01/26/91

C1USA091263504 9WAC9816652823<<
6705215M0812191MEX<<<<<<<<<<<9
RESENDEZ<<ANTONIO<<<<<<<<<<<<<

U.S. DEPARTMENT OF JUSTICE Immigration and Naturalization Service

**PERMANENT RESIDENT CARD**

The person identified by this card is authorized to work and reside in the U.S.



[EXHIBIT 2]

CASE NO. CR 03-810-PHX-EHC

UNITED STATES OF AMERICA

VS. JUAN RESENDIZ-PONCE

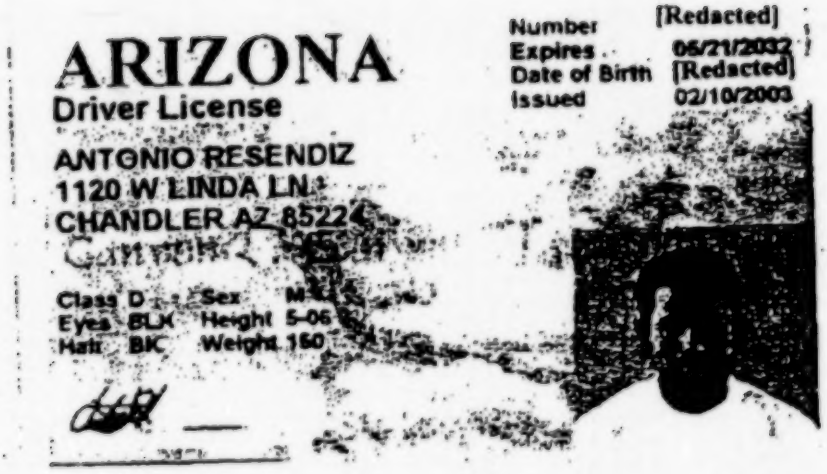
PLAINTIFF'S EXHIBIT 2

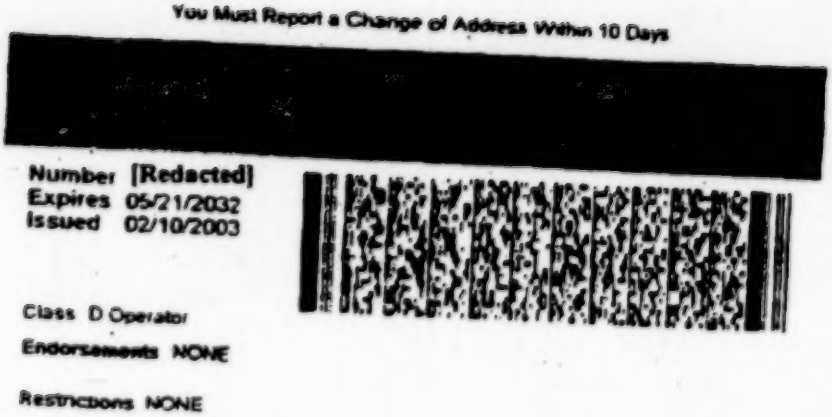
DATE _____ IDEN.

DATE _____ EVID.

BY _____
Deputy Clerk

AO 386


ARIZONA
Driver License
ANTONIO RESENDIZ
1120 W LINDA LN
CHANDLER AZ 85224
Class D Sex M
Eyes BLK Height 5-06
Hair BIK Weight 160
Number [Redacted]
Expires 05/21/2032
Date of Birth [Redacted]
Issued 02/10/2003


You Must Report a Change of Address Within 10 Days
[redacted]
Number [Redacted]
Expires 05/21/2032
Issued 02/10/2003
Class D Operator
Endorsements NONE
Restrictions NONE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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No. CR 03-00810-001-PHX-EHC

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

JUAN RESENDIZ-PONCE, DEFENDANT

---

[May 25, 2004]

---

**JUDGMENT IN A CRIMINAL CASE**

---

USM#: 61830-208 ICE#: A73934853

**THERE WAS A** verdict of guilty as to Count I of the Indictment.

**ACCORDINGLY, THE COURT HAS ADJUDICATED THAT THE DEFENDANT IS GUILTY OF THE FOLLOWING OFFENSE:** violating Title 8, USC § 1326(a), Illegal Re-entry after Deportation, a Class D Felony offense, as charged in Count I of the Indictment.

**IT IS THE JUDGMENT OF THIS COURT THAT** the defendant is hereby committed to the custody of the Bureau of Prisons for a term of **SIXTY THREE (63) MONTHS** on Count I. Upon release from imprisonment the defendant shall be placed on supervised release for a term of **THIRTY SIX (36)** months on Count I. The Court recommends that the defendant be placed in an institution in the southwestern part of the United States where there are education programs and vocational training available for his participation.

**CRIMINAL MONETARY PENALTIES**

The defendant shall pay to the Clerk, U.S. District Court, Attn: Finance, Suite 130, 401 West Washington St., SPC 1, Phoenix, AZ 85003-2118, the following total criminal monetary penalties:

**SPECIAL ASSESSMENT:** $100.00 **FINE:** $
**RESTITUTION:** $

The Court finds the defendant does not have the ability to pay a fine and orders the fine waived.

The total special assessment of $100.00 shall be paid pursuant to Title 18, United States Code, Section 3013 for Count I of the Indictment.

All monetary penalties are due immediately or in regular monthly installments. If incarcerated, payments shall begin under the Bureau of Prisons Inmate Financial Responsibility Program. Any unpaid balance shall become a condition of supervision and shall be paid within prior to the expiration of supervision. Until all restitutions, fines, special assessments and costs are fully paid, the defendant shall immediately notify the Clerk, U.S. District Court, of any change in name and address.

The Court hereby waives the imposition of interest and penalties on any unpaid balances.

**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant is placed on supervised release for a term of **THIRTY SIX (36) MONTHS** on Count I.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

For offenses committed on or after September 13, 1994: The defendant shall refrain from any unlawful use of a controlled substance. Pursuant to 18 U.S.C. § 3563(a)(5)

and 3583(d) the defendant shall submit to one drug test within 15 days of release from imprisonment and such other periodic drug tests thereafter, as directed from time to time by the probation officer.

The defendant shall not possess a firearm, ammunition or other dangerous weapon as defined in 18 U.S.C. § 921.

The defendant shall comply with the standard conditions of supervision adopted by this Court in General Order 99-9:

1) You shall not commit another federal, state, or local crime during the term of supervision.

2) You shall not leave the judicial district or other specified geographic area without the permission of the Court or probation officer.

3) You shall report to the Probation Office as directed by the Court or probation officer, and shall submit a truthful and complete written report within the first five days of each month.

4) You shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

5) You shall support your dependents and meet other family responsibilities.

6) You shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

7) You shall notify the probation officer at least ten days prior to any change of residence or employment.

8) You shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician. Possession of controlled substances will result in mandatory revocation of your term of supervision. If ordered by the Court to participate in a drug and/or alcohol abuse treatment program, you shall totally abstain from the use of any alcoholic beverages or other intoxicants during and after the course of your treatment.

9) You shall not frequent places where controlled substances are illegally sold, used, distributed or administered, or other places specified by the Court.

10) You shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

11) You shall permit a probation officer to visit at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

12) You shall immediately notify the probation officer (within forty-eight (48) hours if during a weekend or on a holiday) of being arrested or questioned by a law enforcement officer.

13) You shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.

14) As directed by the probation officer, you shall notify third parties of risks that may be occasioned

by your criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm your compliance with such notification requirement.

15) You shall refrain from possessing a firearm, destructive device, or other dangerous weapon. Possession of a firearm will result in mandatory revocation of your term of supervision. This prohibition does not apply to misdemeanor cases unless special condition imposed by Court.

16) Unless suspended by the Court, you shall submit to one substance abuse test within the first 15 days of supervision and at least two periodic substance abuse tests thereafter, pursuant to 18 U.S.C. §§ 3653(a)(5) and 3583(d);

17) If supervision follows a term of imprisonment, you shall report in person to the Probation Office in the district to which you are released within seventy-two (72) hours of release.

18) The balance of any financial obligation ordered by this Court shall be paid in regular monthly installments approved by the probation officer, the full amount to be paid 90 days prior to expiration of supervision. You will notify the probation officer of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.

The following special conditions are in addition to the conditions of supervised release or supersede any related standard condition:

1. You shall participate as instructed by the probation officer in a program of substance abuse

treatment which may include testing for substance abuse. You shall contribute to the cost of treatment in an amount to be determined by the probation officer.

**THE DEFENDANT IS ADVISED OF DEFENDANT'S RIGHT TO APPEAL WITHIN 10 DAYS OF ENTRY OF JUDGMENT.**

The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

**IT IS FURTHER ORDERED** that the Clerk of the Court deliver two certified copies of this judgment to the United States Marshal of this district.

The Court orders commitment to the custody of the Bureau of Prisons and recommends: the defendant be placed in an institution in the southwestern part of the United States where there are education programs and vocational training available for his participation.

Date of Imposition of Sentence: **Monday, May 24, 2004**

/s/ EARL H. CARROLL Date 5-25-04
EARL H. CARROLL, United States District Judge

**Return**

I have executed this judgment as follows: _____

Defendant delivered on _____ at _____, the institution designated by the Bureau of Prisons, with a certified copy of this judgment in a Criminal case.

_____ By: _____

United States Marshal Deputy Marshal

(2)

FILED
JUN 23 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-998

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

JUAN RESENDIZ-PONCE

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

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## QUESTION PRESENTED

Whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error.

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# In the Supreme Court of the United States

No. 05-998

UNITED STATES OF AMERICA, PETITIONER

*v.*

JUAN RESENDIZ-PONCE

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 425 F.3d 729.

### JURISDICTION

The judgment of the court of appeals was entered on October 11, 2005. On January 3, 2006, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 8, 2006. The petition was filed on that date and granted on April 17, 2006. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.

## STATEMENT

After a jury trial in the United States District Court for the District of Arizona, respondent was convicted of attempting to reenter the United States after deportation, in violation of 8 U.S.C. 1326(a). He was sentenced to 63 months of imprisonment, to be followed by three years of supervised release. J.A. 65-71. The court of appeals reversed and remanded, reasoning that the indictment omitted an element of the offense and that the omission constituted a "fatal flaw" necessitating automatic reversal. Pet. App. 1a-10a.

1. On August 28, 2002, respondent, a Mexican national, was convicted in state court of kidnapping his former stepdaughter (who was also the mother of his 3-year-old child). While respondent was jailed for that offense, he admitted that he had previously been deported from the United States and that he had thereafter reentered the country without first obtaining permission to do so. On October 15, 2002, respondent was again removed from the country. Pet. App. 2a; J.A. 37-44; Presentence Report ¶ 18.

On June 1, 2003, respondent approached the port of entry at San Luis, Arizona, and presented a permanent resident card and driver's license to Agent Nancy Vela of U.S. Customs and Border Protection (CBP). Both forms of identification actually belonged to respondent's cousin, Antonio Resendiz. Respondent claimed that he was a legal resident and told Agent Vela that he was going to Calexico, California. Because Agent Vela believed that respondent did not resemble the person on the identification cards, she referred him to CBP Agent Sean Bly for secondary inspection. When Agent Bly asked respondent about his intended destination, he said

that he was going to Phoenix. Respondent was thereafter detained. Pet. App. 2a; J.A. 29-37.

2. On July 30, 2003, a grand jury in the District of Arizona indicted respondent on one count of attempting to reenter the United States after deportation, in violation of 8 U.S.C. 1326(a). The indictment made the following allegations:

> On or about June 1, 2003, JUAN RESENDIZ-PONCE, an alien, knowingly and intentionally attempted to enter the United States of America at or near San Luis in the District of Arizona, after having been previously denied admission, excluded, deported, and removed from the United States at or near Nogales, Arizona, on or about October 15, 2002, and not having obtained the express consent of the Secretary of the Department of Homeland Security to reapply for admission.

J.A. 8. The indictment also stated that respondent was being charged under 8 U.S.C. 1326(a) and that the government was seeking a sentencing enhancement under 8 U.S.C. 1326(b)(2), which provides for a higher maximum sentence where the prior removal followed a conviction for an aggravated felony. J.A. 8.

3. Before trial, respondent moved to dismiss the indictment. Under Ninth Circuit law, one element of the offense of attempted unlawful reentry is that "the defendant committed an overt act that was a substantial step towards reentering without [the] consent [of the Attorney General]." *United States* v. *Gracidas-Ulibarry*, 231 F.3d 1188, 1196 (2000) (en banc). In his motion to dismiss, respondent contended that the indictment "fail[ed] to allege an essential element, an overt act, or to state the essential facts of such overt act." Mot. to Dismiss 3.

After a hearing, the district court denied the motion. J.A. 26-27.

At trial, the government introduced testimony from Agents Vela and Bly, together with other evidence, demonstrating that respondent had presented false identification at the border and made contradictory statements concerning his intended destination. See J.A. 29-37, 61-64. After the district court denied the defense's motion for an acquittal, the defense rested without presenting any witnesses. See J.A. 47. At the close of the evidence, the district court instructed the jury that the government was required to prove beyond a reasonable doubt, *inter alia*, that respondent had "attempted to enter the United States * * * by intentionally committing an overt act that was a substantial step towards reentering the United States." J.A. 49. In closing arguments, the government contended that respondent met that requirement by presenting false identification at the border and making contradictory statements concerning his intended destination, see J.A. 52; the defense contended that respondent had made no further attempt to enter *after* he had presented the identification and made the relevant statements, see J.A. 57. The jury returned a guilty verdict, and the district court enhanced respondent's sentence on the ground that respondent's prior removal followed his conviction for kidnapping, an aggravated felony. Pet. App. 3a. Respondent was sentenced to 63 months of imprisonment, to be followed by three years of supervised release. J.A. 65-71.

4. The court of appeals reversed and remanded for dismissal of the indictment. Pet. App. 1a-10a. The court first noted that the commission of an "overt act that was a substantial step toward reentering" is an "essential element" of the crime of attempted unlawful reentry, *id.*

at 3a-4a (citation omitted), and that "[t]he indictment in this case does not explicitly allege an overt act," *id.* at 4a. The court rejected, *inter alia*, the government's argument that the indictment *implicitly* alleged that respondent had committed an overt act. *Id.* at 5a-6a.

Relying on its earlier decision in *United States* v. *Du Bo*, 186 F.3d 1177 (9th Cir. 1999), the court of appeals then held that, where a defendant makes a timely objection at trial, "[f]ailure to allege an essential element of the offense is a fatal flaw not subject to mere harmless error analysis." Pet. App. 6a. "The purpose of this rule," the court explained, "is to secure the basic institutional purpose of the grand jury, by ensuring that a defendant is not convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury that indicted him." *Ibid.* (internal quotation marks and citation omitted). While there were "a number of * * * acts that the government might have alleged as a substantial step toward entry into the United States," the court reasoned, "the indictment merely alleged that [respondent] 'attempted to enter' the United States, which simply repeats the ultimate charge against him." *Id.* at 7a. The court thus concluded that "failure to allege any specific overt act that is a substantial step toward entry is a fatal defect in an indictment for attempted entry following deportation under 8 U.S.C. § 1326." *Ibid.*

Judge Reavley, sitting by designation, concurred. Pet. App. 7a-10a. He stated that he was obligated to concur "because of this circuit's precedent," but that he "fail[ed] to see any other reason for this holding." *Id.* at 7a. Judge Reavley contended that "[t]he indictment charged [respondent] with 'knowingly and intentionally' attempting to enter the country in violation of § 1326 and thus fairly implied that he committed an overt act in

doing so." *Id.* at 9a. He further noted that "[t]he judge directed the jury to convict [respondent] under § 1326 only if it found beyond a reasonable doubt that he 'intentionally committed an overt act that was a substantial step towards reentering the United States.'" *Ibid.* Judge Reavley therefore concluded that "[t]he indictment should pass muster and would do so in other circuits." *Ibid.*

5. Shortly after the panel's decision in this case, the Ninth Circuit denied the petition for rehearing en banc in another case in which the government sought reconsideration of the rule that the omission of an offense element from a federal indictment constituted structural error necessitating automatic reversal. See *United States* v. *Omer*, 429 F.3d 835 (2005), petition for cert. pending, No. 05-1101 (filed Feb. 28, 2006). Judge Graber, joined by Judges Kozinski, O'Scannlain, Bybee, Callahan, and Bea, dissented from the denial of rehearing en banc. *Id.* at 835-843. She contended that an "absolute rule" of automatic reversal "makes no sense." *Id.* at 835. Judge Graber reasoned that the court of appeals' rule was inconsistent with this Court's decision in *Neder* v. *United States*, 527 U.S. 1 (1999), which held that the omission of an offense element from the petit jury's instructions does not constitute structural error. 429 F.3d at 840-841. "The situation in *Neder*," Judge Graber explained, "presents a close parallel to the omission of an element from an indictment and leaves us with an incongruity: Omission of an element from an indictment is subject to automatic reversal, but omission of the same element from a jury instruction is not." *Id.* at 840. "[T]he right to a grand jury finding of probable cause as to each element of the offense," she continued, "is no more important, no more central to the fundamental

fairness of a prosecution, than the right to a petit jury's finding that each element was proved beyond a reasonable doubt." *Ibid.*

Judge Graber also rejected the proposition that "there is no way to evaluate, or to cure, any prejudice caused by the omission of an element from an indictment." 429 F.3d at 840. To the contrary, she reasoned, "it is possible (and, indeed, commonplace) to review the omission of an element from a grand jury's indictment for harmless error." *Ibid.* Judge Graber observed that, under this Court's decisions—most notably, *United States* v. *Mechanik*, 475 U.S. 66 (1986)—most errors in grand jury proceedings are subject to harmless-error analysis. 429 F.3d at 840-841. And she noted that this Court's decision in *United States* v. *Cotton*, 535 U.S. 625 (2002), which held that the omission of a sentence-enhancing fact from a federal indictment did not constitute reversible *plain* error, "rebut[s] the idea that omission of an element from an indictment *always* renders a criminal proceeding unfair." 429 F.3d at 841.

## SUMMARY OF ARGUMENT

Like most other constitutional errors, the omission of an element of a criminal offense from a federal indictment, in violation of the Grand Jury Clause of the Fifth Amendment, is amenable to harmless-error analysis. This Court has held that an error is intrinisically harmful, or "structural," only in a limited number of contexts in which the error infects the entire trial process or otherwise renders the trial fundamentally unfair. That is not the case with the indictment error at issue here. Such an error is harmless when it is clear beyond a reasonable doubt that the grand jury would have deter-

mined that there was probable cause with regard to the omitted element.

In *Neder* v. *United States*, 527 U.S. 1 (1999), the Court held that the omission of an offense element from the petit jury's instructions does not constitute structural error. It logically follows that the omission of an offense element from a federal indictment is not structural error either. If anything, the latter type of omission constitutes an even weaker candidate for classification as a structural error than the former. In light of the considerably greater protections afforded to the accused at trial, it would be anomalous to conclude that the failure to submit an offense element to the grand jury would automatically require reversal of a defendant's conviction when the failure to submit an offense element to the petit jury would not.

This Court's decisions concerning grand jury errors likewise suggest that the omission of an offense element from a federal indictment is amenable to harmless-error review. The Court has generally held that errors occurring at the grand jury stage are subject to harmless-error analysis. The sole exception—purposeful racial discrimination in the grand jury's selection—is readily distinguishable from the error at issue here. The Court has also held that a materially identical error—the omission of a sentence-enhancing fact from the indictment—did not constitute reversible plain error because such an error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. That holding supports the conclusion that such an error would not be structural, insofar as it suggests that such an error would not automatically or inherently affect a defendant's substantial rights.

Nothing in the notice-giving function of indictments or in the historical operation of the grand jury supports a rule of automatic reversal. Deficiencies in notice are readily amenable to analysis for prejudice, and, as this case illustrates, are often not prejudicial. Moreover, the possibility of "nullification" by the grand jury does not preclude harmless-error analysis of the error at issue here, just as the power of a petit jury to nullify does not preclude harmless-error analysis of the omission of an offense element from the petit jury's instructions.

Finally, the error in this case was clearly harmless. The relevant inquiry is whether it is clear beyond a reasonable doubt that, but for the error, the grand jury would still have returned an indictment. In engaging in that inquiry, a reviewing court may consider the entirety of proceedings before the trial court. Where the petit jury is fully apprised of the need to find an element omitted from the indictment and then finds that the element has been proved beyond a reasonable doubt, the omission of the element from the indictment is harmless. In light of the petit jury's guilty verdict, a contrary rule would effectively grant defendants a windfall. In this case, because the petit jury plainly found that the omitted element had been proved beyond a reasonable doubt, the error at issue was harmless.

## ARGUMENT

### THE OMISSION OF AN ELEMENT OF A CRIMINAL OFFENSE FROM A FEDERAL INDICTMENT IS SUBJECT TO HARMLESS-ERROR REVIEW

The Grand Jury Clause of the Fifth Amendment states that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." This Court

has held that the Grand Jury Clause requires that every element of a criminal offense be charged in a federal indictment. See, *e.g.*, *Almendarez-Torres* v. *United States*, 523 U.S. 224, 228 (1998); *United States* v. *Miller*, 471 U.S. 130, 136 (1985); *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). That requirement ensures that the grand jury has considered all of the elements of the offense before deciding to indict. Cf. *United States* v. *Calandra*, 414 U.S. 338, 343 (1974) (noting that the responsibilities of the grand jury include "the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions"); *Stirone* v. *United States*, 361 U.S. 212, 218 (1960) (asserting that "the very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge").[1]

Under the court of appeals' view of the elements of the offense of attempted unlawful reentry in violation of 8 U.S.C. 1326(a), the indictment in this case was constitutionally deficient because it did not allege the commission of an overt act that was a substantial step toward unlawful reentry. The government has not challenged that holding before this Court.[2] The court of appeals

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[1] This Court has repeatedly assumed, though it has never squarely held, that the grand jury must find that there is probable cause to believe that the accused has committed the charged offense (and thus that there is probable cause to believe that each of the offense elements has been satisfied). See, *e.g.*, *United States* v. *Mechanik*, 475 U.S. 66, 70 (1986); *Calandra*, 414 U.S. at 343; *Branzburg* v. *Hayes*, 408 U.S. 665, 686-687 (1972).

[2] Specifically, in its petition for certiorari, the government did not seek review of (1) the court of appeals' holding that the commission of

erred, however, in its additional holding that the omission of an offense element from a federal indictment requires automatic reversal. Like most constitutional errors, the omission of an offense element from a federal indictment is subject to harmless-error analysis. Such an error should be found harmless when a reviewing court concludes that it is clear beyond a reasonable doubt that the grand jury would have determined that there was probable cause to believe that the omitted offense element had been satisfied.

### A. Most Constitutional Errors Are Subject To Harmless-Error Review

The widespread adoption of harmless-error rules in American jurisprudence occurred in the early twentieth century, arising out of concern that appellate courts were reversing criminal convictions on the basis of mere technical errors. See *Kotteakos* v. *United States*, 328 U.S. 750, 759-760 (1946). In *Chapman* v. *California*, 386 U.S. 18, 22 (1967), this Court first held that constitutional errors, like non-constitutional errors, may be harmless and thus do not necessarily require reversal. The Court has since recognized that "most constitutional errors can be harmless." See *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991). In cases involving constitutional error, the harmless-error doctrine, which applies when the defendant has made a timely objection that the trial court erroneously rejects, requires an appellate court to disregard the error where it is clear beyond a reasonable doubt that the error did not affect the out-

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an overt act was an element of the offense of attempted unlawful reentry or (2) its holding that the indictment did not sufficiently allege that element by simply alleging that the defendant had engaged in an "attempt[]" to reenter unlawfully.

come of the proceedings. See, *e.g.*, *Neder* v. *United States*, 527 U.S. 1, 7 (1999); cf. Fed. R. Crim. P. 52(a) (stating that "[a]ny error * * * that does not affect substantial rights must be disregarded").[3]

This Court has treated a "very limited class" of fundamental constitutional errors as so intrinsically harmful that they require reversal without inquiry into whether they had an effect on the outcome. *Johnson* v. *United States*, 520 U.S. 461, 468 (1997). Errors have been classified as intrinsically harmful, or "structural," when they "infect the entire trial process," *Brecht* v. *Abrahamson*, 507 U.S. 619, 630 (1993); "necessarily render a trial fundamentally unfair," *Rose* v. *Clark*, 478 U.S. 570, 577 (1986); or affect "[t]he entire conduct of the trial from beginning to end" and "the framework within which the trial proceeds," *Fulminante*, 499 U.S. at 309, 310. In *Johnson*, 520 U.S. at 468-469, and *Neder*, 527 U.S. at 8, this Court identified six examples of structural error: (1) a biased trial judge, see *Tumey* v. *Ohio*, 273 U.S. 510 (1927); (2) the complete denial of counsel, see *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); (3) the denial of self-representation at trial, see *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984); (4) the denial of a public trial, see *Waller* v. *Georgia*, 467 U.S. 39 (1984); (5) racial

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[3] Where the error at issue is not of constitutional dimension, the reviewing court is instead required to determine whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos*, 328 U.S. at 776. The same standard applies where the error at issue is of constitutional dimension but is being reviewed in the context of a federal habeas proceeding. See *Brecht* v. *Abrahamson*, 507 U.S. 619, 638 (1993). In the federal system, when the defendant has failed to make a timely objection, the defendant is required to carry the burden of establishing plain error. See, *e.g.*, *United States* v. *Cotton*, 535 U.S. 625, 631-634 (2002); *Johnson* v. *United States*, 520 U.S. 461, 466 (1997); *United States* v. *Olano*, 507 U.S. 725, 734-735 (1993).

discrimination in the selection of a grand jury, see *Vasquez* v. *Hillery*, 474 U.S. 254 (1986); and (6) the administration of a defective reasonable-doubt instruction, see *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993).

### B. The Omission Of An Offense Element From A Federal Indictment Is Analogous To The Omission Of An Offense Element From The Petit Jury's Instructions, Which Is Subject To Harmless-Error Review

Consistent with the principle that most constitutional errors are subject to harmless-error review, the Court has noted that, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." *Rose*, 478 U.S. at 579. The omission of an offense element from a federal indictment does not implicate the defendant's right to counsel or the impartiality of the adjudicator. Nor is there any basis for concluding that the "strong presumption" in favor of harmless-error review has been overcome. In *Neder*, *supra*, this Court held that the omission of an offense element from the petit jury's instructions does not constitute structural error. 527 U.S. at 8-15. It necessarily follows from that holding that the omission of an offense element from a federal indictment is not structural error either.

1. In *Neder*, the error at issue was the failure to submit the element of materiality to the jury in a tax-fraud case. 527 U.S. at 4. The Court reasoned that "[t]he error at issue here * * * differs markedly from the constitutional violations we have found to defy harmless-error review." *Id.* at 8. "Unlike such defects as the complete deprivation of counsel or trial before a biased judge," the Court explained, "an instruction that

omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 9. To the contrary, the Court noted that "[the defendant] was tried before an impartial judge, under the correct standard of proof and with the assistance of counsel," and "a fairly selected, impartial jury was instructed to consider all of the evidence and argument in respect to [the defendant's] defense against the tax charges." *Ibid.* The Court therefore concluded that "the omission of an element is an error that is subject to harmless-error analysis." *Id.* at 15.

2. There is no justification for treating the failure to submit an offense element to the grand jury differently from the failure to submit an element to the petit jury. The omission of an element from the indictment does not "infect the entire trial process" or "necessarily render a trial fundamentally unfair." *Neder*, 527 U.S. at 8 (citations omitted). Nor is the grand jury's function of protecting against unfounded prosecution "fundamentally undermine[d]," *id.* at 19, when the grand jury finds probable cause with regard to all but one of the elements of the offense, and when a reviewing court concludes that any rational grand jury would have found probable cause with regard to the omitted element as well. Instead, much as in *Neder*, application of harmless-error analysis to the omission of an offense element from the indictment appropriately balances "society's interest in punishing the guilty" against the constitutional right to an indictment by a grand jury. *Id.* at 18 (quoting *Connecticut* v. *Johnson*, 460 U.S. 73, 86 (1983) (plurality opinion)). The harmless-error doctrine thereby "serve[s] a very useful purpose insofar as [it] block[s] setting aside [the defendant's conviction] for small errors or

defects that have little, if any, likelihood of having changed the result of the trial." *Chapman*, 386 U.S. at 22.

If anything, the type of omission at issue here constitutes an even weaker candidate for structural error than the type of omission in *Neder*, for three primary reasons. First, the Fifth Amendment right to an indictment by a grand jury, unlike the Sixth Amendment right to a trial by a petit jury, has not been incorporated against the States through the Fourteenth Amendment as an essential requirement of fundamental fairness. Compare *Hurtado* v. *California*, 110 U.S. 516, 538 (1884) (right to indictment by a grand jury), with *Duncan* v. *Louisiana*, 391 U.S. 145, 147-158 (1968) (right to a trial by a petit jury). In fact, the Fifth Amendment right to indictment by a grand jury is one of the few protections in the Bill of Rights which have not been incorporated. See *Albright* v. *Oliver*, 510 U.S. 266, 272-273 (1994); *Alexander* v. *Louisiana*, 405 U.S. 625, 633 (1972). Fewer than half of the States require grand jury indictments as a matter of state law—and several of those States require grand jury indictments only for charges that could result in a capital sentence or life imprisonment. See 1 Sara Sun Beale et al., *Grand Jury Law and Practice* §§ 1:1, 1:7, at 1-3, 1-32 & n.1.1 (2d ed. 1997 & Supp. 2005) (Beale). It would be unusual if a constitutional right that does not even apply in a state prosecution were held to be so fundamental that its infringement in a *federal* prosecution would automatically require reversal.

Second, the grand jury's return of an indictment is only the opening act in a criminal proceeding; the main act is the trial. In *Hurtado*, the Court rejected the view that a grand jury indictment is required as a matter of due process, reasoning that any proceeding that leads to

charges against a defendant is "merely * * * preliminary" and "can result in no final judgment, except as the consequence of a regular judicial trial." 110 U.S. at 538; see *United States* v. *Williams*, 504 U.S. 36, 51 (1992); *Respublica* v. *Shaffer*, 1 Dall. 236, 237 (Pa. 1788). The grand jury is not the final arbiter of the facts, but instead merely determines whether there is probable cause to believe that the accused committed the crime; the government must still prove at trial, beyond a reasonable doubt, that the accused is guilty. An error that is confined to the grand jury stage thus does not inherently undermine a later criminal conviction; to the contrary, such an error may effectively be rendered moot by subsequent developments at the trial stage. See pp. 35-38, *infra*.

Third, although the grand jury undoubtedly performs a vital protective function, the petit jury provides far greater protection for the accused. See *United States* v. *Cotton*, 535 U.S. 625, 634 (2002); *United States* v. *R. Enters., Inc.*, 498 U.S. 292, 298 (1991). Whereas the accused has the right to a public trial, see U.S. Const. Amend. VI; *Waller*, 467 U.S. at 46, the grand jury operates in secret, and the accused ordinarily has no right to disclosure of matters occurring before the grand jury, see Fed. R. Crim. P. 6(d) and (e). In grand jury proceedings, moreover, the prosecutor has no obligation to present exculpatory evidence, see *Williams*, 504 U.S. at 51-55, and the accused has no right to present evidence at all, see *Calandra*, 414 U.S. at 343-344. The prosecutor may even present evidence that would not be admissible at trial. See, *e.g.*, *id.* at 349-355 (evidence obtained in violation of the Fourth Amendment); *Costello* v. *United States*, 350 U.S. 359, 361-364 (1956) (inadmissible hearsay). The grand jury ultimately decides to

indict by majority vote, see Fed. R. Crim. P. 6(a) and (f), whereas the petit jury in a federal case must unanimously vote to convict, see Fed. R. Crim. P. 31(a). And if a grand jury decides not to indict, the prosecutor may try again before the same (or a different) grand jury, see *Ex parte United States*, 287 U.S. 241, 250-251 (1932), whereas the Double Jeopardy Clause bars a prosecutor from retrying a defendant for the same offense, see U.S. Const. Amend. V. In light of the considerably greater protections afforded to the accused at trial, it would be highly anomalous to conclude that the failure to submit an offense element to the grand jury would necessitate reversal of a defendant's conviction when the failure to submit an offense element to the petit jury would not.

### C. This Court's Decisions Concerning Grand Jury Errors Support The Conclusion That The Omission Of An Offense Element From A Federal Indictment Is Subject To Harmless-Error Review

This Court's decisions applying harmless-error and plain-error analysis to grand jury errors further demonstrate that the omission of an offense element from a federal indictment does not require automatic reversal.

1. a. This Court has indicated that errors occurring at the grand jury stage are generally amenable to harmless-error analysis. In *United States* v. *Mechanik*, 475 U.S. 66 (1986), two witnesses appeared simultaneously before the grand jury, in violation of Federal Rule of Criminal Procedure 6(d). The Court rejected the proposition that "a violation of Rule 6(d) requires automatic reversal of a subsequent conviction regardless of the lack of prejudice." 475 U.S. at 71. The Court noted that Rule 52(a) "provides that errors not affecting substantial rights shall be disregarded," *ibid.*, and con-

cluded that "[w]e see no reason not to apply this provision to [an error] occurring before a grand jury just as we have applied it to such error occurring in the criminal trial itself," *id.* at 71-72. The Court explained that "[t]he reversal of a conviction entails substantial social costs," *id.* at 72, and added that, while reversal may be appropriate when an error "has deprived a defendant of a fair determination of the issue of guilt or innocence," "the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial," *ibid.* The Court ultimately determined that the error at issue was harmless in light of the petit jury's subsequent guilty verdict. *Id.* at 73.

This Court's decision in *Bank of Nova Scotia* v. *United States*, 487 U.S. 250 (1988), further supports the proposition that grand jury errors are generally susceptible to harmless-error review. In *Bank of Nova Scotia*, the Court held that, "as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants." *Id.* at 254. That case involved a number of errors at the grand jury stage, including simultaneous appearances by multiple witnesses before the grand jury, in violation of Rule 6(d), and the improper disclosure of grand jury materials to government employees and potential witnesses, in violation of Rule 6(e). *Id.* at 257-258. Invoking its supervisory authority, the district court dismissed the indictment. *Id.* at 253. In holding that dismissal was unwarranted, the Court emphasized that Rule 52(a) struck a "balance * * * between societal costs and the rights of the accused"—a balance that was no less applicable in the context of grand jury errors than in other contexts. *Id.* at 255. The Court explained that the relevant inquiry, in the context of non-

constitutional grand jury errors, was whether the error "substantially influenced" the grand jury's decision to indict. *Id.* at 256. Applying that standard, the Court ultimately determined that none of the errors warranted dismissal of the indictment, concluding that some errors "plain[ly] * * * could not have affected the charging decision" and that, as to others, "the effect, if any, on the grand jury's decision to indict was negligible." *Id.* at 259-260.

b. The only case in which this Court has characterized a grand jury error as "structural" is *Vasquez*, *supra*. That case involved purposeful racial discrimination in the selection of the grand jury. In holding that such discrimination constituted structural error, the Court relied on an "unbroken line of case law" rejecting the argument that a conviction may stand despite such discrimination. 474 U.S. at 261. The Court reasoned that, in cases involving discrimination in the selection of the grand jury, automatic reversal was "the only effective remedy for [the] violation," *id.* at 262, and added that, "[w]hen constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm," *id.* at 263. The Court further observed that "discrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review." *Id.* at 263-264.

In *Vasquez*, the Court did also assert that "[t]he grand jury is not bound to indict in every case where a conviction can be obtained." 474 U.S. at 263 (citation omitted). Based on that premise, the Court reasoned that, "even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the

indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come." *Ibid.* The Court's reasoning on this point, however, constituted dictum and cannot compel the broader conclusion that all grand jury errors (or all *constitutional* grand jury errors) necessitate automatic reversal. This Court's subsequent decisions in *Mechanik* and *Bank of Nova Scotia* make clear not only that principles of harmless-error review generally apply to errors occurring at the grand jury stage, but also that *Vasquez* is limited to the unique context of discrimination in the selection of grand jurors.

In *Mechanik*, the Court discussed *Vasquez* at length without so much as citing the above reasoning, see 475 U.S. at 70-71 n.1, and concluded that the considerations on which *Vasquez* was based "have little force outside the context of racial discrimination in the composition of the grand jury," *id.* at 71 n.1. Similarly, in *Bank of Nova Scotia*, the Court characterized *Vasquez* as involving an "isolated exception[]" to the harmless-error rule, 487 U.S. at 256, and noted that, with regard to the constitutional error at issue in *Vasquez*, "other remedies were impractical and it could be presumed that a discriminatorily selected grand jury would treat defendants unfairly," *id.* at 257 (citing *Mechanik*, 475 U.S. at 70-71 n.1). Because the omission of an offense element is not a "special problem" akin to a biased (or discriminatorily selected) decisionmaker, *Mechanik*, 475 U.S. at 71 n.1, the error at issue in this case more closely resembles the errors in *Mechanik* and *Bank of Nova Scotia* than it does the error in *Vasquez*.

2. The conclusion that the omission of an offense element from a federal indictment can constitute harmless error is further supported by this Court's decision in *Cotton*, *supra*, which held that a similar error did not constitute reversible plain error. The error in *Cotton* was the failure to allege a sentence-enhancing fact (*i.e.*, drug quantity) in the indictment (accompanied by the failure to obtain a finding on that fact from the petit jury). Because the defendants in *Cotton* did not preserve their objection at trial, the case involved the federal plain-error doctrine, which applies when the defendant fails to make a timely objection in the district court. See Fed. R. Crim. P. 52(b). Under that doctrine, a reviewing court asks whether (1) there is error; (2) the error is plain; (3) the error affects substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Johnson* v. *United States*, 520 U.S. at 466-467. The third component of the plain-error inquiry—namely, whether the error affects substantial rights—largely tracks the harmless-error inquiry applicable when a defendant did make a timely objection at trial.[4]

In *Cotton*, the Court ultimately held that the fourth component of the plain-error inquiry was not satisfied in that case because any error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. 535 U.S. at 632-633. In so holding, the Court specifically reserved the question whether the third component of the plain-error inquiry was satisfied be-

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[4] The primary difference between the harmless-error inquiry and the third component of the plain-error inquiry is that, in the latter context, the *defendant* bears the burden of proving that the error affects his substantial rights. See *United States* v. *Dominguez Benitez*, 542 U.S. 74, 82-83 (2004); *Olano*, 507 U.S. at 734-735.

cause such an error affected the defendants' substantial rights. *Id.* at 632. Notwithstanding that reservation, the Court's analysis of the fourth factor strongly supports the view that the third component was not satisfied either: the finding that the trial evidence on the omitted fact was "overwhelming" and "uncontroverted," *id.* at 633, points toward the conclusion that any grand jury error was not outcome-determinative. At a minimum, the Court's holding that the error at issue did not satisfy the fourth component necessarily means that the error did not *automatically* or *inherently* affect the defendants' substantial rights. It follows that the error was not structural, insofar as a structural error is one that "*necessarily* render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder*, 527 U.S. at 9.[5]

Moreover, in *Cotton*, the Court eliminated one of the premises on which the Ninth Circuit's rule of automatic reversal originally rested: namely, that defects in an indictment deprive a court of subject-matter jurisdiction over the ensuing prosecution. See *United States* v. *Du Bo*, 186 F.3d 1177, 1180 (9th Cir. 1999) (stating that,

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[5] Significantly, in *Neder* itself, the Court relied on its earlier decision in *Johnson* v. *United States*, *supra*, which considered whether an error identical to the one at issue in *Neder* (*i.e.*, the failure to instruct the petit jury on an offense element) constituted reversible plain error. In *Johnson*, as in *Cotton*, the Court held that the error did not satisfy the fourth component of the plain-error inquiry. See 520 U.S. at 470. In *Neder*, the Court noted that, "[a]lthough reserving the question whether the omission of an element *ipso facto* 'affect[s] substantial rights,' we concluded [in *Johnson*] that the error did not warrant correction in light of the 'overwhelming' and 'uncontroverted' evidence supporting materiality." 527 U.S. at 9 (citations omitted). So too here, the Court's decision in *Cotton* "cuts against the argument that [the error at issue] will *always* render a trial unfair." *Ibid.*

where an indictment "lacks a necessary allegation," it "does not properly allege an offense against the United States" and "leaves nothing for a petit jury to ratify") (internal quotation marks and citations omitted). Specifically, the Court overruled its earlier decision in *Ex parte Bain*, 121 U.S. 1 (1887), to the extent that it held that indictment defects were jurisdictional. See *Cotton*, 535 U.S. at 630 (explaining that "*Bain*'s elastic concept of jurisdiction is not what the term 'jurisdiction' means today, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case") (internal quotation marks and citation omitted). *Cotton* thus reinforces the conclusion that the omission of an offense element from a federal indictment does not automatically require reversal, whether on jurisdictional grounds or otherwise.

### D. Notice Concerns Do Not Mandate Treating Indictment Errors As Structural

A claim that an indictment's omission of an element impairs the notice-providing function of the charging instrument cannot support a rule of automatic reversal. The court of appeals did not base its rule of automatic reversal on any deficiency in notice provided by the indictment. While the court mentioned in passing that respondent had a right "to be apprised of what overt act the government will try to prove at trial," Pet. App. 6a, it ultimately justified its rule of automatic reversal by explaining that "[t]he purpose of this rule is to secure the basic institutional purpose of the grand jury," *ibid.* To the extent that a function of the grand jury requirement is to give notice, that function plainly is not one that only the grand jury can perform, and the extraordinary remedy of automatic reversal is therefore not war-

ranted for any failure to provide sufficient notice in the indictment.

1. The Constitution requires that, in a federal or state prosecution, a defendant be given notice of the nature of the charge against him. Notice is expressly guaranteed in the Sixth Amendment, which provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to * * * be informed of the nature and cause of the accusation." But it is also rooted in fundamental principles of due process, see, *e.g.*, *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948) (noting that "[n]o principle of procedural due process is more clearly established than that notice of the specific charge * * * [is] among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal"), and to some extent, in federal prosecutions, in the Grand Jury Clause itself, see *Hamling*, 418 U.S. at 117.[6] The purpose of that requirement is sufficiently to "apprise the accused of the crime with which he stands charged," so as to enable him to prepare his defense. *United States* v. *Mills*, 32 U.S. (7 Pet.) 138, 142 (1833); see *Hamling*, 418 U.S. at 117; *United States* v. *Cruikshank*, 92 U.S. 542, 557-558 (1876). Consistent with that purpose, lower courts have typically held that a charging document will meet the constitutional notice requirement if it merely sets out the "essential facts" underlying the charged offense; it is not necessary that a charging document allege factual details on every element of the offense in order to provide adequate notice. See 4 Wayne R. LaFave et al., *Criminal Procedure* § 19.3(a),

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[6] In federal prosecutions, that requirement is also reflected in Federal Rule of Criminal Procedure 7(c)(1), which provides, *inter alia*, that an indictment must contain "a plain, concise, and definite written statement of the essential facts constituting the offense charged."

at 766 (2d ed. 1999) (LaFave) (noting that "[a]n element of a crime very often can be pleaded without providing any specific factual reference").

2. An indictment's omission of an element of a crime does not necessarily mean that a defendant's right to receive notice has been so impaired that reversal is warranted on that basis. An indictment that identifies the basic time and nature of a crime, and that identifies the statute alleged to be violated, puts the defendant on notice that the government intends to prove each and every element in order to obtain a conviction. A defendant faced with such an indictment ordinarily will be able to frame a defense based on that information. Moreover, where an indictment provides insufficient factual detail to inform the defendant of the nature of the charge, it would be particularly inappropriate to apply a rule of automatic reversal because the defendant has other means of receiving notice of the factual allegations that the government intends to prove at trial. Most significantly, the defendant may file a motion for a bill of particulars, in which the defendant lists a series of questions concerning the charged offense that he wants the government to answer. See, *e.g.*, Fed. R. Crim. P. 7(f). A court is required to issue a bill of particulars where "it is necessary that defendant have the particulars sought in order to prepare the defense and in order that prejudicial surprise will be avoided." 1 Charles Alan Wright, *Federal Practice and Procedure: Criminal* § 129, at 652 (3d ed. 1999) (citing cases). In addition, the defendant may be able to obtain information concerning the factual specifics of the government's case through pretrial discovery. See, *e.g.*, Fed. R. Crim. P. 16(a).

The explicit notice requirement of the Sixth Amendment is violated only if a defendant can show not only

that the indictment was deficient because it provided insufficient factual detail, but also that the defendant suffered actual prejudice from that deficiency. See, *e.g.*, *United States* v. *Wydermyer*, 51 F.3d 319, 325 (2d Cir. 1995). There is no reason for taking a different approach to alleged Grand Jury Clause violations based on impairments of the notice-giving function of a federal indictment.

3. This Court's decision in *Stirone*, *supra*, does not require a different conclusion. In *Stirone*, the Court held that the Fifth Amendment was violated, and automatic reversal warranted, when the government proved an element at trial based on a factual theory that deviated from the factual theory advanced in the indictment. *Id.* at 217. *Stirone* was decided before this Court first recognized that harmless-error analysis was applicable to constitutional errors. See *Chapman*, 386 U.S. at 22. The opinion's analysis thus does not justify an expansive application of automatic reversal principles. Indeed, this Court has not included *Stirone* in its list of cases constituting the class of errors deemed "structural." See *Neder*, 527 U.S. at 8; *Johnson* v. *United States*, 520 U.S. at 468-469.

In any event, *Stirone* is distinguishable on its facts. Whereas in *Stirone* the indictment may have affirmatively misled the defendant to anticipate that an element would be proved by a particular means, and thus produced surprise when the government altered its theory at trial, in this case respondent does not claim that the factual theory on which he was convicted *conflicted* with the factual theory advanced in the indictment (and passed upon by the grand jury); instead, he contends only that the indictment failed sufficiently to *inform* him of the factual theory on which the government intended

to proceed. Given that *Stirone* assumed that a conviction could be valid when an indictment is "drawn in general terms" rather than specifying the particular theory of proving an element, 361 U.S. at 218, that decision cannot support the view that *any* deficiency in notice automatically requires reversal.[7]

4. There is no difficulty with evaluating a claim of deficient notice for its prejudicial effect. Here, for example, there is no indication that respondent suffered any surprise that impeded the preparation of his defense. Although respondent knew that an "overt act" was an element of the offense of attempted unlawful reentry under 8 U.S.C. 1326(a), respondent made no effort before trial to determine the specific "overt act" on which the government intended to rely (*e.g.*, by filing a motion for a bill of particulars). Nor can respondent identify any particular way in which the failure to specify in the indictment the "overt acts" on which the government ultimately relied at trial—*i.e.*, respondent's presentation of false identification at the border and his contradictory statements concerning his intended destination—actually hampered the preparation or presentation of his defense. Indeed, respondent's defense to the "overt act" element ultimately rested solely on the asserted legal insufficiency of the government's evidence. As this case illustrates, in the context of claimed inadequate notice—in which it is easy to assess any prejudice flowing from an error, and in which the error will often be clearly harmless—there is no warrant for applying the rarely employed tool of automatic reversal.

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[7] For the reasons discussed above, see pp. 11-23, *supra*, *Stirone* also does not justify the conclusion that a grand jury's failure to consider a particular mode of proof requires automatic reversal. See 361 U.S. at 218-219.

### E. Historical Evidence Concerning The Role Of The Grand Jury Does Not Suggest That The Omission Of An Offense Element From The Indictment Constitutes Structural Error

There is no basis in the history of the institution of the grand jury for the conclusion that the omission of an offense element from a federal indictment constitutes structural error. That history confirms that the role of the grand jury is to indict whenever there is probable cause to believe that the accused committed the charged crime. While there is some evidence to suggest that grand juries have occasionally refused to return indictments even when probable cause has been established, it does not follow that the failure to instruct the grand jury on one element of the crime should be treated as intrinsically harmful.

1. a. Although the grand jury may have originated in Norman times (if not earlier), see 3 LaFave § 8.2(a), at 11, it is commonly considered to be "an English institution," and "[t]here is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor." *Costello*, 350 U.S. at 362. Starting in the seventeenth century, the English grand jury began to function as a body that protected the innocent from unfounded charges. For example, in 1681, grand juries refused to indict two political enemies of King Charles II, the Earl of Shaftesbury and Stephen Colledge, for treason. See *United States* v. *Navarro-Vargas*, 408 F.3d 1184, 1190-1191 (9th Cir.), cert. denied, 126 S. Ct. 736 (2005). Reflecting that practice, commentators observed that the role of the grand jury was to protect against unsubstantiated charges. Blackstone wrote that the function of the grand jury was to deter-

mine "whether there be sufficient cause to call upon the party to answer [the accusation]," and added that "[a] grand jury * * * ought to be thoroughly persuaded of the truth of an indictment so far as their evidence goes, and not to rest satisfied merely with remote probabilities." 4 William Blackstone, *Commentaries on the Laws of England* *303. Another leading figure described grand juries as "our only Security, in as much as our Lives cannot be drawn into jeoperdy * * * unless such a number of our honest Country Men shall be satisfied in the truth of the Accusations." John Somers, *The Security of English-Mens Lives* 23 (1681).[8]

b. Like their English counterparts, grand juries in the American colonies refused to return indictments when there was insufficient evidence to support the underlying charges. Colonial grand juries, however, occasionally went further and refused to indict even when there was apparently sufficient evidence. Perhaps most notably, three successive New York grand juries refused to indict John Peter Zenger, a newspaper publisher, for libeling the Governor. See James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger* 1-35 (Stanley Nider Katz ed., 1963) (Alexander). Not long before the Revolution, moreover, Massachusetts grand juries refused to indict the leaders of the Stamp Act riots, and later refused to indict the editors of the Boston Gazette on similar libel charges. See Richard D. Younger, *The People's Panel: The Grand Jury in the United States, 1634-1941*, at 28 (1963) (Younger).

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[8] See also Henry Care, *English Liberties* 252 (4th ed. 1719) (describing the grand jury's role as "preserv[ing] the Innocent from the Disgrace and Hazards which ill Men may design to bring them to, out of Malice, or through Subornation, or other sinister Ends").

c. As initially drafted, the Constitution contained no provision for the establishment of federal grand juries. During the debates on ratification, however, various delegates to the state conventions expressed concern about the absence of a grand jury requirement. At the Massachusetts convention, one delegate argued that an express grand jury requirement was necessary to prevent "the most innocent person in the commonwealth" from being "dragged from his home [and] his friends" and being subjected to "long, tedious, and perhaps painful imprisonment" before ultimately being acquitted at trial. 5 *The Founders' Constitution* 260 (Philip B. Kurland & Ralph Lerner eds., 1987) (statement of Abraham Holmes). John Hancock subsequently proposed language to codify such a requirement, and that language was adopted, with slight modification and little discussion, as the Grand Jury Clause of the Fifth Amendment. See 1 Beale § 1:4, at 1-18 to 1-19; Jon Van Dyke, *The Grand Jury: Representative or Elite?*, 28 Hastings L.J. 37, 39 (1976).[9]

At least in the immediate aftermath of the adoption of the Constitution, American grand juries continued occasionally to refuse to return indictments even when the evidence was apparently sufficient. Federal grand juries refused to indict individuals who were charged with aiding the French in their war against the British, in violation of the Neutrality Proclamation of 1793, see Younger 49, and grand juries in Kentucky and Mississippi refused to indict former Vice President Aaron Burr for treason (although a grand jury in Virginia subsequently did return an indictment), see *Navarro-Vargas*,

[9] Only three of the original 13 States expressly guaranteed the right to indictment by grand jury in their own constitutions. See 1 Beale § 1:4, at 1-17 & n.7.

408 F.3d at 1193. In the years that followed, however, "dramatic confrontations between prosecutors and jurors in grand jury proceedings * * * bec[a]me rare." *Id.* at 1195.

d. While the evidence suggests that grand jury nullification sometimes occurred even after the adoption of the Constitution, there is no reason to believe that it was ever formally sanctioned. Grand jury charges dating from the earliest days of the Republic—including instructions delivered by members of this Court, sitting on circuit—reflect the understanding that a grand jury has a "duty" to indict upon finding that there is probable cause to believe that the accused has committed the charged offense.[10] Moreover, the model grand jury charge approved by the Judicial Conference of the United States directs grand jurors that "you should vote to indict where the evidence presented to you is sufficiently strong to warrant a reasonable person's belief that the person being investigated is probably guilty,"

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[10] See, *e.g.*, *Charge to Grand Jury*, 30 F. Cas. 992, 993 (C.C.D. Cal. 1872) (No. 18,255) (Field, J., in chambers) (noting the grand juror's "duty to the government, or more properly speaking, to society, to see that parties against whom there is just ground to charge the commission of crime, shall be held to answer the charge"); *Charge to Grand Jury—Neutrality Laws*, 30 F. Cas. 1021, 1023 (No. 18,267) (C.C.D. Ohio 1851) (McLean, J., in chambers) ("If it shall appear from the evidence that shall be given, that any of our citizens have violated the above law, it will be your duty to indict them."); 2 *The Documentary History of the Supreme Court of the United States, 1789-1800*, at 30 (Maeva Marcus ed., 1988) (charge by Jay, C.J., to the grand jury of the Circuit Court for the District of New York in 1790) ("In a word Gentlemen your Province and your Duty extend (as has been before observed) to the Inquiry and Presentment of all offences of every kind committed against the United States in this District or on the high Seas by Persons in it.").

and cautions grand jurors not to "judge the wisdom of the criminal laws enacted by Congress" or to "consider punishment in the event of conviction." Judicial Conference of the United States, *Model Grand Jury Charge* ¶¶ 9, 10, 25 (2005) <http://www.uscourts.gov/jury/charge.html>.

The oaths administered to grand jurors have similarly required decisions based on the evidence, rather than on personal predilection. As this Court has noted, "in this country as in England of old the grand jury has * * * pledged to indict no one because of prejudice and to free no one because of special favor." *Costello*, 350 U.S. at 362. The traditional version of the oath directs that "you shall present no one for envy, hatred, or malice; neither shall you leave any one unpresented for fear, favor or affection, hope of reward or gain, but shall present all things truly as they come to your knowledge, according to the best of your understanding." George J. Edwards, *The Grand Jury* 96-97 (1906) (citation omitted). The model oath in the federal benchbook contains materially identical language. See Federal Judicial Center, *Benchbook for U.S. District Court Judges* 204 (4th ed. 2000).

Accordingly, this Court has repeatedly stated that the role of the grand jury is to protect the "innocent" against unfounded accusations—not to protect individuals who are probably guilty. See, *e.g.*, *Williams*, 504 U.S. at 51 (stating that "the grand jury sits * * * to assess whether there is adequate basis for bringing a criminal charge"); *United States* v. *Dionisio*, 410 U.S. 1, 16-17 (1973) (contending that "[the grand jury's] mission is to clear the innocent, no less than to bring to trial those who may be guilty"); *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962) (noting that, "[h]istorically, [the grand

jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution").[11] That characterization of the role of the grand jury is entirely accurate. A grand jury has the *duty* to return an indictment upon finding that there is probable cause to believe that the accused has committed the charged offense—even if it is true, as a practical matter, that the grand jury has the raw *power* not to indict if it so chooses.

2. Even assuming that grand juries legitimately may engage in nullification by refusing to return indictments even when probable cause has been established, it does

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[11] To the extent that the Court suggested in *Vasquez* that it would be legitimate for a grand jury not to indict even when there was sufficient evidence to do so, see 474 U.S. at 263 (stating that "[t]he grand jury is not bound to indict in every case where a conviction can be obtained"), that suggestion is erroneous. The Court quoted from, and relied exclusively on, Judge Friendly's dissenting opinion in *United States* v. *Ciambrone*, 601 F.2d 616 (2d Cir. 1979). The only relevant historical source cited by Judge Friendly was a state-court grand jury charge advising that "[t]he grand jury may even refuse to indict although its attention is called to a clear violation of law." *Charge of John Raymond Fletcher, Associate Judge, Seventh Judicial Court of Maryland, to the Grand Jury for Calvert County on May 7, 1955*, 18 F.R.D. 211, 214 (Md. Cir. Ct. 1955). As discussed in the text, however, that instruction was contrary to prevailing practice. Judge Friendly also cited three judicial opinions: *United States* v. *Cox*, 342 F.2d 167, 189-190 (5th Cir.) (Wisdom, J., concurring specially), cert. denied, 381 U.S. 935 (1965); *In re Kittle*, 180 F. 946, 947 (S.D.N.Y. 1910); and *United States* v. *Asdrubal-Herrera*, 470 F. Supp. 939 (N.D. Ill. 1979). None of those opinions, however, cites any other historical source showing that the grand jury had unfettered discretion not to indict when probable cause was found. The closest is the discussion in *Asdrubal-Herrera* of the grand jury's refusal to indict Lord Shaftesbury in 1681. *Id.* at 942. That example at most suggests that a grand jury has an unreviewable *power* not to indict when probable cause exists—not that the grand jury has an unfettered *right* not to indict.

not follow that the failure to instruct the grand jury on one element of the crime should be treated as intrinsically harmful. Such an error does not materially affect the grand jury's ability to engage in nullification. The grand jury may still conclude, even in the absence of a particular offense element, that the underlying charge was being pursued for political (or other illegitimate) reasons or that the conduct at issue should not be treated as criminal. Indeed, the omission of an offense element may actually *increase* the likelihood of nullification by jurors who believe that the remaining elements should not constitute a criminal offense. More broadly, a rule that treated the omission of an offense element from a federal indictment as structural error based on the possibility of grand jury nullification would effectively give legal approval to such nullification, in contravention of the principle that nullification is a practice to be tolerated rather than encouraged. Cf. *United States* v. *Thomas*, 116 F.3d 606, 615 (2d Cir. 1997) (noting that "the power of juries to 'nullify' or exercise the power of lenity is just that—a power; it is by no means a right or something that a judge should encourage or permit if it is within his authority to prevent").

If the power of a grand jury to engage in nullification meant that the omission of an offense element from a federal indictment automatically requires reversal, moreover, a similar conclusion would presumably be required concerning the omission of an offense element from the petit jury's instructions. As with grand juries, there is some evidence to suggest that petit juries have occasionally refused to convict defendants even when their guilt has seemingly been established at trial: indeed, after John Paul Zenger was charged by information, he was famously acquitted, see Alexander 22, as

were almost all of the defendants who were successfully indicted for violating the Neutrality Proclamation of 1793, see Younger 49. As this Court's decision in *Neder* demonstrates, however, the power of a petit jury to engage in nullification does not preclude harmless-error analysis. Cf. *United States* v. *Kerley*, 838 F.2d 932, 938 (7th Cir. 1988) (noting that "jury nullification is just a power, not also a right, as is shown among other things by the fact * * * that a trial error which favors the prosecution is harmless if no *reasonable* jury would have acquitted, though an actual jury might have done so.") (citation omitted). Likewise, the power of a grand jury to engage in nullification, in the face of evidence establishing probable cause, does not preclude a court from reviewing the omission of an element from the indictment for harmless error—and concluding that any error was harmless because a rational grand jury would have determined that there was probable cause with regard to that element.

### F. The Omission Of The "Overt Act" Element From Respondent's Indictment Was Harmless

Under a proper application of harmless-error analysis, the error at issue in this case was harmless.

#### *1. The test for harmlessness should focus on whether a properly instructed grand jury would have found probable cause*

In assessing whether an error is harmless, the fundamental question is whether the error caused prejudice to the defendant. See, *e.g.*, *United States* v. *Olano*, 507 U.S. 725, 734 (1993) (noting that, in order to "affect[] substantial rights" for purposes of Rule 52, "in most cases * * * the error must have been prejudicial": *i.e.*, by "affect[ing] the outcome of the district court proceed-

ings"). In cases involving trial errors, this Court has frequently stated that the test for harmless-error analysis is whether it is clear beyond a reasonable doubt that, but for the error, the petit jury would have returned the same verdict. See, *e.g.*, *Neder*, 527 U.S. at 17 (stating that, "where a reviewing court concludes beyond a reasonable doubt that * * * the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless"); *Chapman*, 386 U.S. at 24 (requiring "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"). It necessarily follows that, in a case involving a grand jury error, the test for harmless-error analysis is whether it is clear beyond a reasonable doubt that, but for the error, the grand jury would still have returned an indictment. In engaging in that analysis, a reviewing court is not limited to the record of proceedings before the grand jury. Rather, consistent with this Court's directive in harmless-error cases to examine the entire record of proceedings before the court below, see, *e.g.*, *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986); *United States* v. *Lane*, 474 U.S. 438, 448 n.11 (1986); *United States* v. *Hasting*, 461 U.S. 499, 509 n.7 (1983), a reviewing court should consider the trial record as well.

Where the error at issue involves the grand jury's failure to find that there is probable cause to believe that an offense element has been satisfied, that error is harmless where the petit jury subsequently is properly instructed and finds that the element in question has been proved beyond a reasonable doubt. In *Mechanik*, the Court relied on the petit jury's verdict in holding that the simultaneous appearance of two witnesses before the grand jury, in violation of Rule 6(d), was harm-

less. At the outset, the Court acknowledged that the error at issue "had the theoretical potential to affect the grand jury's determination whether to indict these particular defendants for the offenses with which they were charged." 475 U.S. at 70. Nevertheless, the Court reasoned, "the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt." *Ibid.* The Court therefore concluded that, "[m]easured by the petit jury's verdict, * * * any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt." *Ibid.*

Notably, the Court considered, and rejected, the argument that "the indictment should not be compared to the evidence produced by the Government at *trial*, but to the evidence produced before the *grand jury*." *Mechanik*, 475 U.S. at 71. The Court explained that, "even if this argument were accepted, there is no simple way after the verdict to restore the defendant to the position in which he would have been had the indictment been dismissed before trial." *Ibid.* The Court noted that the defendant "will already have suffered whatever inconvenience, expense, and opprobrium that a proper indictment may have spared him." *Ibid.* "In courtroom proceedings as elsewhere," the Court added, "'the moving finger writes; and, having writ, moves on.'" *Ibid.* The Court concluded that "reversal of a conviction after a trial free from reversible error cannot restore to the defendant whatever benefit might have accrued to him from a trial on an indictment returned in conformity with Rule 6(d)." *Ibid.*

The Court's analysis in *Mechanik* applies with equal force to the omission of an offense element from the indictment, and the guilty verdict of a properly instructed petit jury thus renders such an omission harmless. It is theoretically possible (if unlikely) that, although the petit jury found that the element at issue had been proved beyond a reasonable doubt, the grand jury would not have found that there was probable cause to believe that the element had been satisfied—either because the government did not have sufficient evidence as to that element at the time of the indictment, or because the government simply failed to present its evidence with regard to that element to the grand jury. It does not follow, however, that reversal would be appropriate in those circumstances. To the contrary, reversal would serve no valid purpose, because the government would presumably be able to reindict the defendant (in light of the fact that, by the time of trial, the government had sufficient evidence as to the omitted element to convince the petit jury that the element had been established beyond a reasonable doubt), and because the government would presumably be able to obtain a conviction in any subsequent retrial (in light of the fact that the defendant has already been convicted in an entirely error-free trial). Where a correctly instructed petit jury returns a guilty verdict, therefore, the omission of an offense element from the indictment is harmless.

***2. The evidence in this case establishes that a rational grand jury would have found probable cause***

Although this Court's "usual practice" is to remand for application of the harmless-error standard, *Yates* v. *Evatt*, 500 U.S. 391, 407 (1991), it would be appropriate for the Court to apply that standard itself in this case,

because it is clear that the petit jury found that the omitted element had been proved beyond a reasonable doubt. Cf. *Neder*, 527 U.S. at 16 (determining that the error at issue was harmless because the evidence on the omitted element was "so overwhelming"). Although the district court denied respondent's pre-trial motion to dismiss the indictment on the ground that it did not explicitly allege that respondent had committed an "overt act," see J.A. 8, the district court instructed the petit jury that the government was required to prove beyond a reasonable doubt, *inter alia*, that respondent had "attempted to enter the United States * * * by intentionally committing an overt act that was a substantial step towards reentering the United States," J.A. 49. Because the petit jury was correctly instructed concerning the offense element at issue (and subsequently returned a guilty verdict), the omission of that element from the indictment is necessarily harmless. The court of appeals therefore erred by reversing respondent's conviction based on that omission.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

JUAN RESENDIZ-PONCE

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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# In the Supreme Court of the United States

No. 05-998

UNITED STATES OF AMERICA, PETITIONER

*v.*

JUAN RESENDIZ-PONCE

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

**SUPPLEMENTAL BRIEF FOR THE UNITED STATES**

By order dated October 13, 2006, the Court directed the parties to file supplemental briefs addressing the following question: "Did the indictment omit an allegation that was required by the Fifth Amendment?" The court of appeals held that the indictment in this case was deficient because it alleged only that respondent had engaged in an "attempt[]" to reenter the United States unlawfully on a specified date and at a specified place. See Pet. App. 3a-6a. In its petition for a writ of certiorari, the United States did not seek review of that holding. See Pet. 9 n.3. The position of the United States, however, is that the indictment in this case is in all respects constitutionally valid.[1]

[1] This Court may reach that issue, in its discretion, to the extent that it believes that the issue is a "predicate to an intelligent resolution of the question presented." *United States* v. *Grubbs*, 126 S. Ct. 1494, 1498

### A. An Indictment For The Offense Of Attempted Unlawful Reentry Need Only Allege That The Defendant Attempted To Reenter The Country, Not That The Defendant Took A Substantial Step Toward Reentry

The indictment in this case charged respondent with one count of attempting to reenter the United States after deportation, in violation of 8 U.S.C. 1326(a). As relevant here, that statute imposes criminal penalties on "any alien who * * * has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter * * * attempts to enter * * * the United States" without the consent of the Attorney General (now the Secretary of the Department of Homeland Security, see 6 U.S.C. 202(4), 557 (Supp. IV 2004)). The indictment expressly indicated that respondent was being charged under 8 U.S.C. 1326(a) and further alleged as follows:

> On or about June 1, 2003, JUAN RESENDIZ-PONCE, an alien, knowingly and intentionally attempted to enter the United States of America at or near San Luis in the District of Arizona, after having been previously denied admission, excluded, deported, and removed from the United States at or near Nogales, Arizona, on or about October 15, 2002, and not having obtained the express consent of the Secretary of the Department of Homeland Security to reapply for admission.

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n.1 (2006) (citation omitted); see *Wilkinson* v. *Austin*, 545 U.S. 209, 221 (2005) (reaching the question whether a liberty interest existed, despite the State's concession that it did, before considering what process was due).

J.A. 8. Because the indictment sufficiently alleged all of the elements of the offense of attempted unlawful reentry, it satisfied the requirements of the Grand Jury Clause of the Fifth Amendment.

1. As the government explained in its opening brief (at 9-10), this Court has repeatedly held that the Grand Jury Clause requires that every element of a criminal offense be charged in a federal indictment. See, *e.g.*, *Almendarez-Torres* v. *United States*, 523 U.S. 224, 228 (1998); *United States* v. *Miller*, 471 U.S. 130, 136 (1985); *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). The purpose of that requirement is to ensure that the grand jury has considered all of the elements of the offense before deciding to indict. Cf. *United States* v. *Calandra*, 414 U.S. 338, 343 (1974) (noting that the responsibilities of the grand jury include "the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions").

In order to satisfy the requirement that all of the elements of the offense be charged, it is ordinarily sufficient if the indictment "set[s] forth the offense in the words of the statute itself." *Hamling*, 418 U.S. at 117; see *Potter* v. *United States*, 155 U.S. 438, 444 (1894); *United States* v. *Staats*, 49 U.S. (8 How.) 41, 44 (1849); *United States* v. *Gooding*, 25 U.S. (12 Wheat.) 460, 473-474 (1827); see also, *e.g.*, *United States* v. *Webster*, 125 F.3d 1024, 1029-1030 (7th Cir. 1997), cert. denied, 522 U.S. 1051 (1998); *United States* v. *American Waste Fibers Co.*, 809 F.2d 1044, 1046-1047 (4th Cir. 1987). That rule applies unless the terms of the statute do not "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." *Hamling*, 418

U.S. at 117 (quoting *United States* v. *Carll*, 105 U.S. 611, 612 (1882)). The classic application of that exception is where a *mens rea* requirement is read into a statute whose text lacks such a requirement (*e.g.*, *Staples* v. *United States*, 511 U.S. 600, 619 (1994)). See *United States* v. *Opsta*, 659 F.2d 848, 849-850 (8th Cir. 1981).

2. While an indictment must set out all of the elements of the charged offense, it need not elaborate on all of the ingredients of those elements. Of most relevance here, where a statute contains a term of art that has a "definite * * * legal meaning," it is unnecessary for the indictment to include all the "various component parts" that constitute the legal definition of that term. *Hamling*, 418 U.S. at 118-119; see *Staats*, 49 U.S. (8 How.) at 44 (noting that, "when words or terms of art are used in the [statutory] description [of the offense], that have a technical meaning at common law, these should be followed, being the only terms to express in apt and legal language the nature and character of the crime").[2] Thus, in *Hamling*, the Court held that an indictment alleging that the defendant had mailed "obscene" material was sufficient for purposes of the Grand Jury Clause, even though the indictment failed to allege that the material met the legal definition of "obscenity": *viz.*, by specifying that, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appealed to the

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[2] See also 4 William Blackstone, *Commentaries* *306-*307 (explaining that "in some crimes particular words of art must be used, which are so appropriated by the law to express the precise idea which it entertains of the offence, that no other words, however synonymous they may seem, are capable of doing it," and citing as examples "treasonably," "murdered," "feloniously," "burglariously," and "ravished").

prurient interest. See 418 U.S. at 118-119 (citing *Roth* v. *United States*, 354 U.S. 476 (1957)).[3]

3. Where an indictment charges a defendant with an "attempt" offense, it is unnecessary for the indictment expressly to state that the defendant took a "substantial step" toward completion of the corresponding substantive offense. Like the word "obscene," the word "attempt" is a term of art with a "definite * * * meaning" in federal criminal law. *Hamling*, 418 U.S. at 118-119. It has long been recognized—and, indeed, it is commonly understood—that, in order to engage in an unlawful "attempt," a defendant must take some action toward the completion of the corresponding offense. See, *e.g.*, Model Penal Code § 5.01 commentary at 38-47 (Tentative Draft No. 10, 1960); Edwin R. Keedy, *Criminal Attempts at Common Law*, 102 U. Pa. L. Rev. 464, 474 (1954). In an effort to harmonize the various (similar if not identical) formulations used by courts to specify the conduct that constitutes an "attempt," see *ibid.*, the Model Penal Code defined an "attempt" as "an act or omission constituting a substantial step in a course of conduct planned to culminate in [the defendant's] com-

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[3] This Court has repeatedly rejected challenges to particular terms in an indictment even where those terms are *not* legal terms of art, provided that those terms are merely tracking the relevant statute. See, *e.g.*, *United States* v. *Debrow*, 346 U.S. 374, 377 (1953) (holding that the phrase "duly taken an oath" is known to mean taking an oath that was "authorized by a law of the United States"); *Potter*, 155 U.S. at 444 (holding that the word "certified" has a "commonly understood" meaning); *United States* v. *Northway*, 120 U.S. 327, 334-335 (1887) (holding that the word "abstract" is a word of "simple, popular meaning, without ambiguity"); *United States* v. *Simmons*, 96 U.S. 360, 362-363 (1878) (holding that the word "distilling" necessarily means the distilling "of alcoholic spirits").

mission of the crime." Model Penal Code § 5.01(1)(c) (1962).

Although there is no general federal statute that expressly defines the conduct element of an "attempt," the Model Penal Code's formulation has been widely adopted by courts construing the many federal statutes that criminalize attempts.[4] In fact, every federal court of appeals has construed at least one federal attempt statute to require that the defendant take a "substantial step" toward the completion of the corresponding substantive offense.[5]

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[4] See, *e.g.*, 18 U.S.C. 81 (arson); 18 U.S.C. 545 (smuggling); 18 U.S.C. 112 (assault of foreign officials); 18 U.S.C. 1113 (murder or manslaughter); 8 U.S.C. 1324 (transportation of illegal aliens); 18 U.S.C. 1751 (presidential assassination or kidnaping); 18 U.S.C. 1832 (theft of trade secrets); 18 U.S.C. 1951 (robbery or extortion); 18 U.S.C. 1956 (money laundering); 18 U.S.C. 2113 (bank robbery); 18 U.S.C. 2119 (carjacking); 18 U.S.C. 2241 (aggravated sexual assault); 18 U.S.C. 2422 (enticement of a minor to engage in illegal sexual activity); 21 U.S.C. 846 (narcotics offenses); 21 U.S.C. 963 (narcotics importation offenses).

[5] See, *e.g.*, *United States* v. *Dworken*, 855 F.2d 12, 16-17 (1st Cir. 1988) (21 U.S.C. 846); *United States* v. *Crowley*, 318 F.3d 401, 407-408 (2d Cir.) (18 U.S.C. 2241(a)(1)), cert. denied, 540 U.S. 894 (2003); *United States* v. *Kwong*, 14 F.3d 189, 194 (2d Cir. 1994) (18 U.S.C. 1113); *United States* v. *Hsu*, 155 F.3d 189, 202 (3d Cir. 1998) (18 U.S.C. 1832(a)(4)); *United States* v. *McFadden*, 739 F.2d 149, 152 (4th Cir.) (18 U.S.C. 2113(a)), cert. denied, 469 U.S. 920 (1984); *United States* v. *Redd*, 355 F.3d 866, 872-873 (5th Cir. 2003) (21 U.S.C. 846); *United States* v. *Thompson*, 130 F.3d 676, 688 (5th Cir. 1997) (18 U.S.C. 1114), cert. denied, 524 U.S. 920 (1998); *United States* v. *Yang*, 281 F.3d 534, 542 (6th Cir. 2002) (18 U.S.C. 1832), cert. denied, 537 U.S. 1170 (2003); *United States* v. *Williams*, 704 F.2d 315, 321 (6th Cir.) (21 U.S.C. 846), cert. denied, 464 U.S. 991 (1983); *United States* v. *Barnes*, 230 F.3d 311, 314 (7th Cir. 2000) (18 U.S.C. 1956(a)(3)(B)); *United States* v. *Rovetuso*, 768 F.2d 809, 821 (7th Cir. 1985) (18 U.S.C. 1512(a)(2)(A)), cert. denied, 474 U.S. 1076 (1986); *United States* v. *Williams*, 136 F.3d 547, 553 (8th Cir. 1998) (18 U.S.C. 2119), cert. denied, 526 U.S. 1003 (1999); *United*

The offense of attempted unlawful reentry, in violation of 8 U.S.C. 1326(a), is no different from other federal attempt offenses in that regard. Some courts have expressly stated that the offense of attempted unlawful reentry requires a substantial step toward unlawful reentry. See *United States* v. *Marte*, 356 F.3d 1336, 1344-1345 (11th Cir. 2004); *United States* v. *De Leon*, 270 F.3d 90, 92 (1st Cir. 2001). Others, in listing the elements of that offense, have said only that the government must show that the defendant "attempted" to reenter the country unlawfully—relying on the accepted legal meaning of an "attempt" to supply the requisite components of that element. See, *e.g.*, *United States* v. *Rodriguez*, 416 F.3d 123, 128 (2d Cir. 2005), cert. denied, 126 S. Ct. 1142 (2006); *United States* v. *Gallagher*, 83 Fed. Appx. 742, 744 (6th Cir. 2003); *United States* v. *Cardenas-Alvarez*, 987 F.2d 1129, 1131-1132 (5th Cir. 1993).

4. In *United States* v. *Gracidas-Ulibarry*, 231 F.3d 1188 (2000) (en banc), the Ninth Circuit stated, in listing the elements of the offense of attempted unlawful reentry, that one element of that offense is that "the defendant committed an overt act that was a substantial step towards reentering without * * * consent." *Id.* at 1196. Although the Ninth Circuit's definition of the con-

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*States* v. *Mims*, 812 F.2d 1068, 1077 (8th Cir. 1987) (21 U.S.C. 843); *United States* v. *Yossunthorn*, 167 F.3d 1267, 1270 (9th Cir. 1999) (21 U.S.C. 841(a)(1)); *United States* v. *Nelson*, 66 F.3d 1036, 1042 (9th Cir. 1995) (18 U.S.C. 1956(a)(3)(C)); *United States* v. *Munro*, 394 F.3d 865, 869 (10th Cir.) (18 U.S.C. 2422(b)), cert. denied, 544 U.S. 1009 (2005); *United States* v. *Bunney*, 705 F.2d 378, 381 (10th Cir. 1983) (18 U.S.C. 844(i)); *United States* v. *Plummer*, 221 F.3d 1298, 1303 (11th Cir. 2000) (18 U.S.C. 545); *United States* v. *McDowell*, 705 F.2d 426, 427-428 (11th Cir. 1983) (21 U.S.C. 846); *United States* v. *Duran*, 96 F.3d 1495, 1507-1508 (D.C. Cir. 1996) (18 U.S.C. 1751(c)).

duct element introduces the phrase "overt act" (a phrase now typically associated with the law of conspiracy, see, *e.g.*, 18 U.S.C. 371), it does not appear to diverge substantively from the Model Penal Code's definition of an attempt offense, and therefore appears correctly to define the conduct element of the offense of attempted unlawful reentry.[6]

The Ninth Circuit erred in this case, however, to the extent that it held, based on *Gracidas-Ulibarry*, that respondent's indictment was constitutionally deficient because it did not expressly state that respondent had taken a "substantial step" toward the completion of reentry (or engaged in an "overt act" that constituted such a "substantial step"). See Pet. App. 3a-6a. Because it is well established that, for purposes of a federal criminal statute, an "attempt" requires a substantial step toward the completion of the offense, the indictment in this case sufficiently alleged the conduct element of the offense of attempted unlawful reentry simply by alleging that the defendant "attempted to enter the United States" unlawfully. That allegation mirrored the statutory language and subsumed the legal requirements to commit an attempt.

Although no other court appears to have addressed such a claim with regard to the offense of attempted unlawful reentry specifically, and although there is a paucity of precedent on the issue with respect to other

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[6] This case does not implicate the validity of the Ninth Circuit's actual *holding* in *Gracidas-Ulibarry*: namely, that another element of the offense of attempted unlawful reentry is that the defendant have acted with a "specific intent" to enter illegally. 231 F.3d at 1192. The indictment alleged that respondent "knowingly and intentionally" made his attempt to reenter, J.A. 8, and the court of appeals did not hold that allegation to be insufficient to allege the requisite mental state.

federal attempt offenses, a number of courts have rejected claims that indictments for other federal attempt offenses must allege, in so many words, that the defendant took a "substantial step" toward the completion of the corresponding offense. See, *e.g.*, *United States* v. *Toma*, No. 94-CR-333, 1995 WL 65031, at *1 (N.D. Ill. Feb. 13, 1995) (holding that, "for indictment purposes, use of the word 'attempt' is sufficient to incorporate the substantial step element," on the ground that "[t]he word 'attempt' necessarily means taking a substantial step" and "it is the language of the statute and the language of the statute generally is sufficient to state a charge"; see also, *e.g.*, *United States* v. *McDarrah*, No. 05-CR-1182 (PAC), 2006 WL 1997638, at *8 (S.D.N.Y. July 17, 2006); *United States* v. *Wood*, 6 F. Supp. 2d 1213, 1218 (D. Kan. 1998).

5. A rule that required an indictment for an "attempt" offense to recite that the defendant took a "substantial step" toward completion of the corresponding substantive offense would cast doubt on numerous federal indictments, because, in drafting indictments, federal prosecutors frequently allege merely that the defendant "attempted" to engage in the substantive offense. See, *e.g.*, *United States* v. *Crayton*, 357 F.3d 560, 567 (6th Cir.) (indictment charging that the defendant "did attempt to knowingly and intentionally possess with intent to distribute . . . cocaine"), cert. denied, 542 U.S. 910 (2004). And it would effectively require the indictment to contain the same level of particularity as a petit jury instruction with regard to the conduct element of an "attempt" offense—in serious tension not only with the Grand Jury Clause as it has hitherto been construed, but also with the rule that an indictment need only contain "a plain, concise, and definite written

statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1).[7]

More generally, prevailing federal practice typically relies on incorporating the language of the statute into an indictment in order to convey to the defendant the legal meaning and subsidiary requirements of the charged offense. Indictments for mail fraud (18 U.S.C. 1341) charge that a defendant engaged in a "scheme or artifice to defraud." Indictments for murder (18 U.S.C. 1111) charge that a defendant acted with "malice aforethought." Indictments for extortion (18 U.S.C. 1951) charge that a defendant acted "under color of official right." Indictments for civil rights violations (18 U.S.C. 242) charge that a defendant acted "under color of law." All of these terms, as explicated in case law, contain subcomponents that a jury must find in order to return a verdict of guilty.[8] But it would seriously depart from the

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[7] Such a rule would also be in some tension with Federal Rule of Criminal Procedure 31(c), which allows a defendant to be found guilty not only of "an offense necessarily included in the offense charged" (*i.e.*, a lesser included offense, see *Schmuck* v. *United States*, 489 U.S. 705, 717-721 (1989)), but also of "an attempt to commit the offense charged" or "an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right." It would be incongruous to conclude that a defendant, in a case like this, could be convicted of an attempt offense when the indictment charged him only with the corresponding substantive offense, but that a defendant could not be convicted of a *charged* attempt offense when the indictment alleges only an "attempt" and does not specifically allege a "substantial step" toward completion of the corresponding offense. See *Toma*, 1995 WL 65031, at *1.

[8] See *Neder* v. *United States*, 527 U.S. 1, 25 (1999) (scheme to defraud must involve "material" falsehoods); *Schad* v. *Arizona*, 501 U.S. 624, 640-641 (1991) (plurality opinion) (describing mental states that satisfy the common-law meaning of malice aforethought); *Evans* v. *United States*, 504 U.S. 255, 268 (1992) (extortion under color of official

manner in which federal prosecutors typically frame indictments to hold that the charging instrument must spell out all of those subcomponents.

### B. An Indictment For The Offense Of Attempted Unlawful Reentry Need Not Specify The Specific Steps That The Defendant Took Toward Reentry

The court of appeals seemingly suggested that the indictment in this case was constitutionally deficient not only because it did not expressly state that respondent had taken a "substantial step" toward the completion of reentry, but also because it did not *specify* what step (or steps) respondent had taken: *e.g.*, by alleging that respondent had presented false identification at a port of entry. See Pet. App. 3a-6a. But the Fifth Amendment does not require that an indictment include the factual means by which the government will prove the elements of an offense. And because the indictment did provide sufficient factual detail to allow respondent to prepare his defense, it afforded respondent sufficient notice of the charged offense for purposes of the Grand Jury Clause of the Fifth Amendment and other constitutional provisions.

1. As the government explained in its opening brief (at 24-25), the Constitution requires that, in a federal or state prosecution, a defendant be given notice of the nature of the charge against him. A claim that an indictment is deficient because it fails to provide sufficient notice of the charge is conceptually distinct from a claim that the indictment is deficient because it fails to allege

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right satisfied by receipt of unauthorized payment in return for official acts); *United States* v. *Price*, 383 U.S. 787, 794 (1966) (color of official right encompasses private person willfully participating in joint activity with the State or its agents).

all of the elements of the offense. A notice claim is textually rooted in the Sixth Amendment, which provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to * * * be informed of the nature and cause of the accusation." See, *e.g.*, *United States* v. *Cruikshank*, 92 U.S. 542, 558 (1876) (stating that, under the Sixth Amendment, "the indictment must set forth the offence with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged") (citation and internal quotation marks omitted). This Court has also suggested that it is rooted, at least to some extent, in the Grand Jury Clause itself. See, *e.g.*, *Hamling*, 418 U.S. at 117 (noting, apparently in reliance on the Grand Jury Clause, that an indictment not only must "contain[] the elements of the offense charged," but also must "fairly inform[] a defendant of the charge against which he must defend").

2. The indictment in this case was valid because it provided sufficient factual detail to enable respondent to prepare his defense. While this Court has repeatedly stated that the indictment must set forth the alleged crime "with reasonable particularity of time, place, and circumstances," *United States* v. *Hess*, 124 U.S. 483, 488 (1888) (quoting *Cruikshank*, 92 U.S. at 558), it has also cautioned that an indictment need not include *all* of the facts that the government intends to prove at trial. See, *e.g.*, *Stirone* v. *United States*, 361 U.S. 212, 218 (1960) (suggesting that an indictment may be drawn "in general terms"); *Cochran* v. *United States*, 157 U.S. 286, 290 (1895) (noting that there are "[f]ew indictments * * * which might not be made more definite by additional allegations" but that "the true test is, not whether [the indictment] might possibly have been made more certain, but whether it * * * sufficiently apprises the

defendant of what he must be prepared to meet"); *United States* v. *Britton*, 107 U.S. 655, 663 (1883) (rejecting claim that factual allegation in indictment was insufficient, because a contrary result "would carry refinement in criminal pleading to an impracticable extent").

The Court has also repeatedly stated that it is ordinarily sufficient if an indictment merely sets forth the elements of the offense in the words of the statute—thereby suggesting that it is ordinarily sufficient for an indictment to provide factual detail only with regard to non-elements such as time and place. See pp. 3-4, *supra*; cf., *e.g.*, *United States* v. *Walsh*, 194 F.3d 37, 44 (2d Cir. 1999) (stating that "we have consistently upheld indictments that do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime") (citation and internal quotation marks omitted). As to the elements themselves, an indictment that satisfies the Grand Jury Clause should generally provide sufficient notice for purposes of the Sixth Amendment. See pp. 18-20, *infra* (discussing *Russell* v. *United States*, 369 U.S. 749 (1962)). Notably, this Court has upheld an indictment that failed to specify the "particular means" by which the crime was committed, on the ground that "[t]he means of effecting the criminal intent * * * or the circumstances evincive of the design with which the act was done, are considered to be matters of evidence to go to the jury to demonstrate the intent, and not necessarily to be incorporated in an indictment." *United States* v. *Simmons*, 96 U.S. 360, 364 (1878) (citation omitted); cf. Fed. R. Crim. P. 7(c)(1) (stating that an indictment "may allege that the means by which the defendant committed the offense are unknown or that the

defendant committed it by one or more specified means").

When measured against those standards, the indictment in this case was plainly sufficient. The indictment identified the date and place of the attempted unlawful reentry: *i.e.*, that respondent attempted to reenter the country unlawfully "[o]n or about June 1, 2003, * * * at or near San Luis in the District of Arizona." Pet. App. 2a. Those factual details were sufficient to enable respondent to prepare his defense, particularly in light of the relatively finite means that an individual could use to attempt to effectuate unlawful reentry at the border (*i.e.*, physically sneaking over the border or fraudulently seeking to enter at a port of entry). If respondent had not been present on the specified date at the specified place, his defense would in no way have been affected by the indictment's failure to identify the step (or steps) he took toward reentry. And if respondent had been present at the time and place alleged, he would presumably be aware of his version of events (and therefore fully able to prepare his defense). In that regard, the indictment in this case is closely analogous to an indictment for other simple offenses such as assault, which need at most identify the time, place, and victim of the offense—and need not specify the means by which the offense was committed (*e.g.*, whether the assailant wielded a candlestick or a revolver). See 4 Wayne R. LaFave et al., *Criminal Procedure* § 19.3(b) at 772 & n.57 (2d ed. 1999) (LaFave) (citing cases). As one commentator has noted, "comparatively little information is needed to prepare a defense for [such] crimes." *Id.* at 771-772.

Respondent has conceded that he had sufficient notice of the factual evidence that the government pos-

sessed of his attempted reentry, insofar as the government disclosed in discovery evidence of the specific actions that respondent took at the border. Oral Arg. Tr. 34 (acknowledging, in response to question, that respondent "kn[e]w beforehand that the Government was going to present evidence of two false identifications"). Respondent instead has suggested only that the *indictment* provided insufficient notice of the charge against him because it did not expressly allege those specific facts. But the indictment need not provide such a specific level of detail in order to allow respondent to frame his defense.[9]

3. Federal courts have routinely held that an indictment for a federal attempt offense need not specifically allege the acts or means by which the defendant attempted to commit the corresponding substantive offense—even in decisions that preceded the promulgation of Federal Rule of Criminal Procedure 7(c), which simplified the pleading standard for federal indictments. Most notably, numerous courts of appeals have rejected claims that, in an indictment for attempted tax fraud, the indictment must allege the means by which the defendant sought to effectuate the fraud. In *Hardesty* v. *United States*, 168 F. 25 (6th Cir. 1909), the court asserted that "[i]t is not fatal * * * that the indictment does not set out the particular acts which are to be relied upon to prove that the government was defrauded out of the tax, or an unsuccessful attempt made to so

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[9] In any event, respondent would plainly be unable to show prejudice from any deficiency, in light of his concession that he had sufficient notice by the time of discovery. Respondent would therefore not be entitled to reversal on any claim of deficient notice from the indictment. See U.S. Br. 23-27.

defraud." *Id.* at 29. Instead, the court reasoned, "[i]t is enough to charge the offense in the words of the statute, as it * * * leaves no room for doubt as to the offense charged and which the defendant is called upon to meet." *Ibid.* Similarly, in *May* v. *United States*, 199 F. 42 (8th Cir. 1912), cert. denied, 227 U.S. 678 (1913), the court rejected the argument that an indictment failed to "advise the defendant of the manner in which he attempted to commit the fraud, so as to enable him to prepare his defense." *Id.* at 45. The court upheld an indictment that alleged only the time and place of the alleged fraud (and the amount that was the subject of the fraud), reasoning that "[t]o have alleged in this indictment how the defendants attempted to defraud the United States would have required a statement of much of the evidence presented at the trial." *Id.* at 46.

In *Capone* v. *United States*, 56 F.2d 927 (7th Cir.), cert. denied, 286 U.S. 553 (1932), the indictment alleged that the defendant, on a date certain, "well knowing all the premises, unlawfully and fraudulently did then and there willfully attempt to evade and defeat the income tax aforesaid upon his said net income" for the previous year. *Id.* at 929 n.3. The court rejected the defendant's argument that the indictment was invalid under this Court's decision in *Cruikshank*. *Id.* at 930-931. The court acknowledged that "the form used [in the indictment] is indeed quite general." *Id.* at 931. The court reasoned, however, that the generality did not render the indictment invalid, but instead would have "abundantly justified [the defendant] in asking the court to require the district attorney to furnish a bill of particulars as to the specific attempts to evade and defeat." *Ibid.* The court concluded that the defendant "made no

such request, and he now has no reason to complain." *Ibid.*[10]

More recently, federal district courts have rejected claims that indictments for various other federal attempt offenses are deficient on the ground that they fail to identify the "substantial step" taken by the defendant toward the completion of the corresponding offense. See, *e.g.*, *United States* v. *Gregory*, No. 03-CR-50027-1, 2003 WL 21698447, at *1 (N.D. Ill. July 21, 2003); *United States* v. *Bolden*, No. 95-40061-01, 1995 WL 783638, at *2 (D. Kan. Dec. 20, 1995). In many of those cases (as here), the defendant appears to have alleged that the indictment was also deficient because it failed to allege that the defendant had taken a "substantial step" in the first place. See, *e.g.*, *McDarrah*, 2006 WL 1997638, at *8; *Wood*, 6 F. Supp. 2d at 1218. In holding that an indictment that does not identify a "substantial step" is constitutionally valid, courts have disagreed only as to whether the government is required to produce a bill of particulars in response to a request that it identify the step (or steps) on which it intends to rely at trial. Compare *id.* at 1219 (requiring bill of particulars), with *Gregory*, 2003 WL 21698447, at *1 (holding that bill of particulars was unnecessary in light of the terms of the indictment and the government's "open door" discovery policy). Finally, the accepted practice under Federal Rule of Criminal Procedure 31(c) of allowing an indictment for the completed crime to suffice

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[10] See also, *e.g.*, *Reynolds* v. *United States*, 225 F.2d 123, 126 (5th Cir.), cert. denied, 350 U.S. 914 (1955); *United States* v. *Miro*, 60 F.2d 58, 60-61 (2d Cir. 1932); *Enders* v. *United States*, 187 F. 754, 757-758 (7th Cir.), cert. denied, 223 U.S. 719 (1911). But see *United States* v. *Ford*, 34 F. 26, 27 (W.D.N.C. 1888); *United States* v. *Ulrici*, 28 F. Cas. 328, 330 (C.C.E.D. Mo. 1875) (No. 16,594).

for an attempt crime (such that the attempt crime need not be mentioned at all) seems difficult to square with a requirement that the indictment provide specific information about the particular substantial step that undergirds the attempt crime. See p. 10, note 7, *supra*.

In sum, federal courts have generally held that an indictment for an attempt offense need not specify the "substantial step" taken by the defendant toward the completion of the corresponding substantive offense. There is no justification for a different result in this case.

### C. Neither *Russell* v. *United States* Nor Older State Court Pleading Practices Require A Federal Attempt Indictment To Allege A Specific Substantial Step

1. This Court's decision in *Russell* v. *United States*, *supra*, does not compel a different conclusion. In *Russell*, the defendants were charged with refusing to answer a question that was "pertinent to the question under inquiry" by Congress, in violation of 2 U.S.C. 192. *Russell*, 369 U.S. at 752 n.2, 755. The Court held that the indictment in that case provided insufficient notice (and that the deficiency in the indictment warranted automatic reversal). *Id.* at 771-772. As a preliminary matter, *Russell* appears distinguishable on its facts, because the Court pointedly noted—using one defendant's case as an example—that the government in the cases before it presented a *different* factual theory (or no theory at all) "[a]t every stage in the ensuing criminal proceeding." *Id.* at 768. *Russell* also heavily relied on a unique function of an indictment under 2 U.S.C. 192: namely, that it provide enough detail to permit federal courts to decide, as a matter of law and before trial, whether the question put to the witness was "pertinent

to the question under inquiry" by Congress. 369 U.S. at 757-759, 772; see *id.* at 756-757.[11]

*Russell* does also suggest that, where an indictment fails to provide factual detail concerning a particularly vital element of the offense, it can "violat[e] * * * the basic principle 'that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him.'" 369 U.S. at 766 (quoting *Simmons*, 96 U.S. at 362). *Russell*, however, does not stand for the broader proposition that an indictment must allege factual detail concerning *every* element of the offense; instead, it deals only with special circumstances in which a particular element must be specified in order for the court and the defendant to determine what specific crime is being alleged. See *id.* at 764 (explaining that "the very core of criminality under 2 U.S.C. § 192 is pertinency to the subject under inquiry of the questions which the defendant refused to answer" and that "[w]here guilt depends so crucially upon such a specific identification of fact * * * an indictment must do more than simply repeat the language of the criminal statute"). In so holding, the Court in no way abrogated or modified the general rule that an indictment need only set forth the alleged crime with *reasonable* factual particularity. See, *e.g.*, *Hess*, 124 U.S. at 487-488; *Cruikshank*, 92 U.S. at 558. And the Court has refused to read *Russell* as requiring an indictment to

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[11] This Court's precedent at the time made "pertinency" an issue of law for the court to decide. *Russell*, 369 U.S. at 755-756 (citing *Sinclair* v. *United States*, 279 U.S. 263 (1929)). This Court has since overruled that precedent, *United States* v. *Gaudin*, 515 U.S. 506, 519-521 (1995) (overruling *Sinclair*), and it has not reconsidered *Russell*'s view about the requisites of an indictment under Section 192 in light of current doctrine.

spell out the meaning of an element that has an accepted legal definition. *Hamling*, 418 U.S. at 118-119. *Russell* has not been extended beyond the context in which it arose, and it should not be construed to require an indictment alleging a federal attempt offense to identify a "substantial step" taken by the defendant toward the completion of the corresponding offense.

2. In the nineteenth and early twentieth centuries, many *state* courts held that an indictment for an attempt offense was deficient unless it specified the act that constituted the attempt. See, *e.g.*, Francis Wharton, *A Treatise on the Criminal Law of the United States* § 292, at 222 (4th ed. 1857) (stating that, while "the same particularity is not necessary [in indictments for attempt offenses] as is required in indictments for the commission of the offense itself," "it is necessary that some act constituting such attempt (e.g., an assault,) should be laid").[12] Other state courts, however, took the opposite view, and (like the more recent federal cases

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[12] See, *e.g.*, *Miller* v. *State*, 95 So. 83, 84 (Miss. 1923); *Wilburn* v. *State*, 97 S.E. 87, 88 (Ga. Ct. App. 1918); *Bond* v. *State*, 152 P. 809, 809 (Okla. Crim. App. 1915) (per curiam); *State* v. *Donovan*, 90 A. 220, 222-223 (Del. Gen. Sess. Ct. 1914); *State* v. *George*, 140 P. 337, 338-339 (Wash. 1914); *Smith* v. *State*, 94 N.W. 106, 107 (Neb. 1903); *Hogan* v. *State*, 39 So. 464, 465 (Fla. 1905); *State* v. *Doran*, 59 A. 440, 441 (Me. 1904); *State* v. *Hager*, 40 S.E. 393, 394 (W. Va. 1901); *Kinningham* v. *State*, 21 N.E. 911, 911 (Ind. 1889); *State* v. *Frazier*, 36 P. 58, 59 (Kan. 1894); *Clark* v. *State*, 8 S.W. 145, 145 (Tenn. 1888); *State* v. *Colvin*, 90 N.C. 717, 719 (N.C. 1884); *Gandy* v. *State*, 14 N.W. 143, 144-145 (Neb. 1882); *Thompson* v. *People*, 96 Ill. 158, 161 (1880) (per curiam); *State* v. *Brannan*, 3 Nev. 238, 239 (1867); *State* v. *Wilson*, 30 Conn. 500, 503-506 (1862); *Commonwealth* v. *Clark*, 47 Va. (6 Gratt.) 675, 684 (Va. Gen. Ct. 1849); *Randolph* v. *Commonwealth*, 6 Serg. & Rawle 398, 399 (Pa. 1821) (per curiam).

discussed above) held that an indictment for an attempt offense need not specify any particular act.[13]

To the extent that the prevailing view in state courts at one time was that an indictment must allege the act that constituted the attempt, those decisions do not shed significant light on the question presented here. First, those decisions do not appear to rest on any federal constitutional ground. The Grand Jury Clause, of course, does not apply in state criminal prosecutions, see *Hurtado* v. *California*, 110 U.S. 516, 538 (1884), and none of those decisions appears to have relied on the Sixth Amendment's notice requirement in holding that an indictment was insufficient.

Instead, those decisions should be understood as applying common-law pleading requirements, which were widely used during that period and involved a "prolix and archaic form of indictment couched in Elizabethan English." Alexander Holtzoff, *Reform of Federal Criminal Procedure*, 12 Geo. Wash. L. Rev. 119, 124 (1944); see 4 LaFave § 19.1(a) at 732 (noting that "courts came to demand that the pleading contain a full statement of the facts and legal theory underlying the charge"; "[i]ndictments were lengthy, highly detailed, and filled with technical jargon"; and "American courts demanded strict adherence to the technical niceties of common law pleading rules"). Those common-law pleading requirements went well beyond what the Constitution required, as this Court seemingly recognized at the time. See *Gooding*, 25 U.S. (12 Wheat.) at 474 (stating that, "[a]t the common law, in certain descriptions of offenses, * * * great nicety and particularity are often neces-

[13] See, *e.g.*, *State* v. *Stevens*, 65 P.2d 612, 614 (Mont. 1937); *State* v. *Topham*, 123 P. 888, 892-893 (Utah 1912); *Jackson* v. *State*, 8 So. 773, 773 (Ala. 1891); *People* v. *Bush*, 4 Hill 133, 134-135 (N.Y. Sup. Ct. 1843).

sary," but that "[i]n general * * * it is sufficient certainty in an indictment to allege the offence in the very terms of the statute"). As States adopted simplified pleading requirements that more closely paralleled the constitutional minimum requirements (as the federal government did with the adoption of Federal Rule of Criminal Procedure 7(c) in 1946), state courts have more frequently, if not entirely consistently, upheld indictments for attempt crimes that do not allege a specific act.[14]

Second, state courts appear to have required indictments to allege the act that constituted the attempt because, at the time, the meaning of the term "attempt" was still relatively uncertain. See, *e.g.*, 1 Francis Wharton, *A Treatise on Criminal Law* § 229, at 298 (11th ed. 1912) (explaining that "'attempt' is a term peculiarly indefinite" with "no prescribed legal meaning").[15] In the federal system (and, indeed, in most state systems), however, the meaning of the term "attempt" is now well-settled. An indictment can therefore rely on that accepted legal meaning to communicate to the defendant the nature of the charge. See *Jackson* v. *State*, 8 So. 773, 773 (Ala. 1891) (holding that, because "[t]he word 'attempt' * * * in this state has a defined legal meaning, * * * an indictment for an 'attempt' to commit an

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[14] See, *e.g.*, *State* v. *Sodders*, 304 N.W.2d 62, 66 (Neb. 1981); *State* v. *Pepka*, 37 N.W.2d 189, 189-190 (S.D. 1949); *People* v. *Miller*, 42 P.2d 308, 308 (Cal. 1935); *State* v. *Wray*, 253 P. 801, 802 (Wash. 1927).

[15] In addition, at least some of the cases cited above involved statutes that not only required the defendant to have "attempted" to commit an underlying offense, but specifically required the defendant to have committed some "act" toward the commission of that offense. See, *e.g.*, *Thompson*, 96 Ill. at 161; *Commonwealth* v. *Clark*, 47 Va. (6 Gratt.) at 677-678, 684.

offense is not indefinite, and does not charge any act not penal"); pp. 5-7, *supra*.

* * * * *

The indictment in this case was constitutionally valid because it sufficiently alleged all of the elements of the offense of attempted unlawful reentry and provided respondent with sufficient factual detail concerning the charge against him. The decision of the court of appeals may be reversed either on that ground or on the ground on which the government sought review: namely, that, even assuming that the indictment failed to allege an element of the offense, any error is harmless where, as here, a properly instructed petit jury returned a guilty verdict.

## CONCLUSION

For the foregoing reasons and those stated in the government's opening and reply briefs, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
*Solicitor General*

OCTOBER 2006

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File date
10/27/06

No. 05-998

IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA,

*Petitioner,*

v.

JUAN RESENDIZ-PONCE,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## INTRODUCTION

Respondent, Juan Resendiz-Ponce, respectfully submits this supplemental brief in response to the Court's Order of October 13, 2006, directing the parties to address the following question: "Did the indictment omit an allegation that was required by the Fifth Amendment?" Respondent submits that it did. At issue is whether the government's indictment was defective for failure to allege an overt act that furthered Respondent's alleged attempted illegal reentry into the United States. That question can be answered in two ways: (1) by addressing the necessity to plead elements of an offense in an indictment; and (2) by addressing what those elements are for an attempt prosecution pursuant to 8 U.S.C. § 1326. Consequently, Respondent's brief first will address why an indictment under section 1326(a) must contain an overt act constituting a substantial step towards completion of the alleged attempted reentry. Secondly, even though the government has not challenged the Ninth Circuit's formulation of the essential elements of attempted reentry under section 1326 to include an overt act that is a substantial step towards reentry, Respondent's brief will also address the necessary elements of section 1326, even though that question was not raised below or, until now, before this Court.

## I. WHERE A STATUTE CONTAINS GENERIC TERMS SUCH AS "ATTEMPT" THE FIFTH AMENDMENT REQUIRES ALLEGATIONS OF BOTH SPECIFIC INTENT AND AN OVERT ACT WHICH CONSTITUTES A SUBSTANTIAL STEP TOWARDS COMPLETION.

### A. The Fifth Amendment Requires That Indictments Set Forth The Essential Elements Of The Offense(s) Charged

The Fifth Amendment's indictment requirement serves three important purposes: (1) to guarantee that defendants are apprised of the crime(s) with which they are charged; (2) to protect defendants against later prosecution for the same

offense; and (3) to ensure that defendants are tried only on charges returned by the grand jury in the indictment. *See Russell v. United States*, 369 U.S. 749, 763-64 (1962); *United States v. Miller*, 471 U.S. 130, 140 (1985); *Stirone v. United States*, 361 U.S. 212, 216-17 (1960). *See also Hamling v. United States*, 418 U.S. 87, 117 (1974); *United States v. Debrow*, 346 U.S. 374, 376 (1953); *Hagner v. United States*, 285 U.S. 427, 431-32 (1932).

An indictment satisfies its apprisal or notice function when it "'contains the elements of the offense intended to be charged.'" *Russell*, 369 U.S. at 763 (internal citation omitted); *see also* 1 Charles Alan Wright, *Federal Practice and Procedure* § 125 (3d ed. 1999 & Supp. 2006). This Court's decision in *Russell* re-affirmed the holdings in a long-standing line of cases requiring that, regardless of whether an offense is defined at common law or by statute, if the definition "'includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, – it must descend to particulars.'" *Russell*, 369 U.S. at 765 (citing *United States* v. *Cruikshank*, 92 U.S. 542, 558 (1875)); *see also Batchelor v. United States*, 156 U.S. 426, 429 (1895); *United States v. Hess* 124 U.S. 483, 486 (1888); *Ex Parte Virginia*, 100 U.S. 339, 351-52 (1879) (Field, J., dissenting); *United States v. Simmons*, 96 U.S. 360, 362 (1877); J. Archbold, *Pleading and Evidence in Criminal Cases* 88 (15th ed. 1862). To be sure, the Federal Rules of Criminal Procedure "encourage succinct criminal pleadings" but the Court requires more when the statute at issue contains generic terms; thus, the "descend to particulars" language demands that the prosecution do more than parrot statutory language or general common law terms. Instead, the prosecution must, at a minimum, identify the manner and means by which the defendant violated the statute. *United States v. Stavroulakis*, 952 F.2d 686, 693 (2d Cir. 1992) (citing Fed. R. Crim. P. 7(c)(1) and 1 Wright & Miller, *Federal Practice and Procedure* § 123, at 346-47 (2d ed. 1982)).

Even where a statute does not contain generic terms, "succinct pleading" requirements do not allow prosecutors to simply regurgitate statutory language and demand that the defense (through discovery and motions) and the courts (through resolution of those motions) extract those essential specifics. *See Russell*, 369 U.S. at 770 ("a bill of particulars cannot save an invalid indictment"). "[I]t is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished ...." *United States v. Carll*, 105 U.S. 611, 612 (1881). Although the statutory language may be used to provide the "general description of an offense, ... it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *Hess*, 124 U.S. at 487. Thus, any determination of the constitutionality of an indictment under the Fifth Amendment must begin with an examination of the elements of the offense charged.

### B. The Essential Elements Of Criminal Attempt Are Specific Intent And An Overt Act That Constitutes A Substantial Step In Furtherance Of The Offense.

Since its inception, the crime of attempt has required a showing of both intent and action. As far back as medieval law, a defendant could not be found guilty of attempt unless he had "manifested his intent 'by some open deed tending to the execution of his intent.'" 2 Wayne R. LaFave, *Substantive Criminal Law* § 11.2, at 205 & n.4 (2d ed. 2003) (citing E. Coke, *Third Institute* 5 (1644)). This requirement of intent plus overt act[1] has carried through to the modern

[1] An overt act consists of "'an act or omission constituting a substantial step.'" Am. Law Inst., *Model Penal Code* § 5.01(1)(c) (1962); *see also United States v. Yang*, 281 F.3d 534, 543 (6th Cir. 2002) (defining attempt

day. Criminal attempt requires: "(1) an intent to do an act or to bring about a certain consequence which would in law amount to a crime; and (2) an act in furtherance of that intent." *Id.* § 11.3, at 211. The common law definition of attempt, therefore, has long required and continues to require that a defendant have specific intent to engage in criminal conduct and to engage in an overt act "'which is a substantial step towards committing the crime.'" *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1192 (9th Cir. 2000) (en banc); *accord United States v. Figueroa*, 976 F.2d 1446, 1459 (1st Cir. 1992); *United States v. Manley*, 632 F.2d 978, 987 (2d Cir. 1980); *United States v. Mandujano*, 499 F.2d 370, 376 (5th Cir. 1974). This Court, too, has recognized that use

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as: "(1) an intent to engage in criminal activity, and (2) the commission of an overt act constituting a substantial step towards the commission of the substantive offense"); *Black's Law Dictionary* 137 (8th ed 2004) (defining attempt as "[a]n overt act that is done with the intent to commit a crime but that falls short of completing the crime").

The requirement of alleging an overt act also exists in the context of conspiracy. The elements of common law conspiracy are: "(1) an agreement between two or more persons, which constitutes the act; and (2) an intent thereby to achieve a certain objective which, under the common law definition, is the doing of either an unlawful act or a lawful act by unlawful means." 2 LaFave, *supra* § 12.2, at 265. Today, many statutes require a showing of an additional overt act, separate and apart from the agreement itself. *See, e.g.*, 18 U.S.C. § 371 (explicitly requiring that a conspirator "do any act to effect the object of the conspiracy"); 18 U.S.C. § 1511(a)(1) (requiring that "one or more of [the conspirators] does any act to effect the object of such a conspiracy"). Where a statute requires an additional overt act, the prosecution must set forth that act in the indictment. *See e.g.*, *United States v. McDade*, 28 F.3d 283, 300 (3d Cir. 1994) (addressing an indictment under 18 U.S.C. § 371); *Hudspeth v. McDonald*, 120 F.2d 962, 965 (10th Cir. 1941) (finding that for a prosecution under § 371, "it is necessary to allege and prove an overt act"). If an indictment for conspiracy, which "'attacks inchoate crime at a far more incipient stage [than attempt],'" *United States v. Nichols*, 169 F.3d 1255, 1274 (10th Cir. 1999), must allege an overt act, then it logically follows that an indictment for attempt, for which the overt act takes on greater significance as it must illustrate a substantial step towards completion of the crime, must also allege an overt act.

of the term "attempt" in a statute necessarily requires a showing of a substantial step, regardless of whether the statute is derived from the common law. *See, e.g.*, *Braxton v. United States*, 500 U.S. 344, 349 (1991) (attempted murder); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 455 (1993) (attempted monopolization requires an act beyond mere preparation) (citing *Swift & Co. v. United States*, 196 U.S. 375, 402 (1905)).

*1. Intent.* Criminal attempt is a specific intent crime. "Under the prevailing view, an attempt thus cannot be committed by recklessness or negligence or on a strict liability basis, even if the underlying crime can be so committed." 2 LaFave, *supra* § 11.3, at 211. *See also United States* v. *Bailey*, 444 U.S. 394, 405 (1980) (noting that "inchoate offenses such as attempt and conspiracy" require a showing of specific intent); 4 Charles E. Torcia, *Wharton's Criminal Law* § 695, at 591-97 (15th ed. 1996).

Although seemingly counter-intuitive, a heightened *mens rea* requirement for attempt serves a valuable purpose, even when, as here, the completed crime requires only general intent. The requirement removes "the uncertainty whether the defendant's purpose was indeed to engage in criminal, rather than innocent, conduct." *Gracidas-Ulibarry*, 231 F.3d at 1193. Where conduct is ambiguous, a requirement of purpose or intention properly prevents prosecutions for potentially innocent conduct. For example, in the immigration context, without the requirement of specific intent, previously deported individuals approaching the border of the United States merely to request information as to how to apply for re-entry could be charged with attempted illegal reentry under 8 U.S.C. § 1326(a). This scenario is not merely hypothetical. In *United States v. Morales-Tovar*, 37 F. Supp. 2d 846 (W.D. Tex. 1999), when defendant Morales-Tovar went to a port of entry and requested an application for a resident alien card he was arrested under § 1326(a) even though he did not apply for admission to the United States.

*2. An Overt Act Which Is A Substantial Step Towards Completion Of The Crime.* Because the overt act is what moves an individual's unactionable thoughts into the realm of criminal attempt, the overt act consisting of a substantial step towards completion of a crime is an essential element of the offense. 2 LaFave, *supra* § 11.3, at 211. Given that this Court has long held that the essential elements of an offense must be alleged in an indictment, *see Carll*, 105 U.S. at 612, an indictment which fails to identify the overt act in an attempt prosecution is necessarily insufficient under the Fifth Amendment. This is not to say that an indictment must allege a litany of facts ranging from the vital to the mundane, nor must the government identify every fact it intends to introduce.[2] As the Fifth Circuit noted, "a defendant's constitutional *right* to know the offense with which he is charged must be distinguished from a defendant's *need* to know the evidentiary details establishing the facts of such offense." *United States v. Gordon*, 780 F.2d 1165, 1172 (5th Cir. 1986). However, a defendant's constitutional right to know the charged offense requires that the indictment "state all the facts and circumstances comprised in the definition of the offence, by the rule of the common law or statue on which the indictment is founded. And these must be stated with clearness and certainty, otherwise, the indictment will be bad." Archbold, *supra* at 88. Such clearness and clarity plainly require the indictment to set forth the overt act constituting a substantial step.

The instant case demonstrates that this is neither a weighty nor prejudicial requirement for the prosecution. If the substantial step was tendering false identification, the government need not state in the indictment that Respondent attempted to enter the country by showing a laminated, 2 inch

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[2] Contrary to Judge Reavley's concurrence below, Respondent does not claim the indictment is deficient because it "failed to charge him with attempt to enter illegally because it does not contain a laundry list of the actions he took in doing so." *United States v. Resendiz-Ponce*, 425 F.3d 729, 733 (9th Cir. 2005).

by 3 inch red and white Arizona driver's license in the name of his cousin, which he had obtained three days earlier. Instead, the prosecution is required only to identify the step taken, for example, that Respondent tendered false identification at a point of entry. It is only then that the indictment would set forth an essential element of criminal attempt – the overt act which constitutes a substantial step towards completion of the crime.

Respondent was indicted for attempting to enter the United States in violation of 8 U.S.C. § 1326(a). The indictment in its entirety reads as follows:

> On or about June 1, 2003, JUAN RESENDIZ-PONCE, an alien, knowingly and intentionally attempted to enter the United States of America at or near San Luis in the District of Arizona, after having been previously denied admission, excluded, deported and removed from the United States at or near Nogales, Arizona, on or about October 15, 2002, and not having obtained the express consent of the Secretary of the Department of Homeland Security to reapply for admission.

JA at 8. Although Respondent was on notice that he was charged with attempting to enter, he was not apprised of the overt act that the prosecution would attempt to prove and against which he would have to defend. The indictment claims only that Respondent attempted to reenter the country after being deported. The indictment nowhere descends to the particulars of the charged offense. As the Ninth Circuit observed, there were any number of overt acts that the prosecution could have alleged including: physical crossing into a port of entry; tendering false identification; lying to officers; or successfully entering the country. The indictment in this case gave no such detail, and merely parroted the words of the statute, utterly failing to meet minimum constitutional requirements.

As a consequence, while Respondent may have known that he was charged with the generic crime of "attempted reentry,"

the indictment said nothing about what deed he had done to manifest that intent. That omission not only deprived him of the notice guaranteed by the constitutional requirement that each element be alleged, *see Russell*, 369 U.S. at 763, it also created one of the predicaments against which the Court warned in *Russell*: Respondent "'could ... be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.'" *See id.* at 770 (citation omitted).[3] If the substantial step is not alleged, the defendant can never know whether he was prosecuted based upon "facts ... found by ... the grand jury which indicted him." *See id.* Thus, even if the constitutionally-mandated apprisal function could be satisfied by the minimal allegations made here, the right to be tried on only the grand jury's actual findings is lost. And for the reasons explained in Respondent's brief, such an abrogation of the grand jury's function constitutes structural, rather than harmless error. Principal among those reasons is that there is no record on which to assess whether the grand jury found the necessary facts that are the basis for the charge and the absolute inevitability that a subsequent conviction will render any deficiency in an indictment harmless and result in a tautological application of the rule.

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[3] Yet another function of an indictment would also be compromised by the failure to allege a substantial step.

> It has long been recognized that there is an important corollary purpose to be served by the requirement that an indictment set "out the specific offence, coming under the general description," with which the defendant is charged. This purpose ... is "to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had."

*Russell*, 369 U.S. at 768 (quoting *Cruikshank*, 92 U.S. at 558). This function serves the interests of both the prosecution and the defense by permitting courts to exercise "enlightened judgment" as to the validity of a conviction. *See id.* at 769.

## II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT A SUBSTANTIAL STEP IS AN ELEMENT OF AN ATTEMPTED REENTRY UNDER 8 U.S.C. § 1326.

### A. The Court Of Appeals' Formulation Of The Elements Of An Attempted Reentry Offense Under 8 U.S.C. § 1326 Was Not Challenged Below And Is Not Properly Before The Court.

The Court of Appeals relied upon *Gracidas-Ulibarry* in determining that the offense with which Respondent was charged included, "as an essential element, that 'the defendant committed an overt act that was a substantial step toward reentering [the United States].'" *United States v. Resendiz-Ponce*, 425 F.3d 729, 731 (9th Cir. 2005) (quoting *Gracidas-Ulibarry*, 231 F.3d at 1196). In the district court, Respondent moved to dismiss the indictment for failure to allege an "overt act in furtherance of the attempted illegal reentry," JA at 10-12, and Petitioner responded by asserting that "the indictment sufficiently alleges an overt act." *See id.* at 15. Thus, Petitioner did not challenge the necessity to prove "an overt act that was a substantial step toward reentering [the United States]," *see Resendiz-Ponce*, 425 F.3d at 731, in the district court.

Nor did it do so in the Court of Appeals. Indeed, in that court, Petitioner conceded that a substantial step was properly included as an element of the charged offense of attempted reentry after deportation. The district court instructed the petit jury that the prosecution was obliged to prove, beyond a reasonable doubt, that the defendant "intentionally commit-t[ed] an overt act that was a substantial step towards re-entering the United States." *See* JA at 50. Prosecutors made no objection to this instruction as would be required for any criminal defendant to preserve an issue for appeal. Further, in its Response Brief in the Court of Appeals, Petitioner conceded that "[t]he district court properly instructed the jury with regard to the overt act." Brief of Appellee United States

at 20, *United States v. Resendiz-Ponce*, 425 F.3d 729 (9th Cir. filed Jan. 31, 2005) ("U.S. Br.").

Because Petitioner not only failed to challenge the substantial step element below but conceded the propriety of the district court's jury instruction on it, Petitioner has plainly waived any right to challenge its status as an element. *See generally Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). *See also Ryder v. United States*, 515 U.S. 177, 188 (1995) (declining to reach harmless error argument that was not raised by the government below). Nor does any exception to the normal requirement that an issue be preserved below apply here. While the Court has "previously held that [a] claim [not pressed below] is preserved if made by the current litigant in 'the recent proceeding upon which the lower courts relied for their resolution of the issue, and [the litigant] did not concede in the current case the correctness of that precedent,'" *United States v. Vonn*, 535 U.S. 55, 58 n.1 (2002) (third alteration in original) (quoting *United States v. Williams*, 504 U.S. 36, 44-45 (1992)), Petitioner can meet neither of those criteria – which are listed in the conjunctive – here.

First, Petitioner cannot point to any previous objection it made in this case to the Court of Appeals' holding that a substantial step was required. As noted above, the Court of Appeals' opinion in the instant case derived its statement that a substantial step was an element from *Gracidas-Ulibarry*. *See Resendiz-Ponce*, 425 F.3d at 731 (quoting *Gracidas-Ulibarry*, 231 F.3d at 1196). Even more broadly, it is not at all clear that Petitioner, in *Gracidas-Ulibarry*, even opposed the imposition of a substantial step requirement.[4] Rather, it appears to have confined its arguments to its view that the *mens rea* for a section 1326 attempt should be general intent, the same as that required for "illegal reentry." *See Gracidas-Ulibarry*, 231 F.3d at 1194-95 (citing *Pena-Cabanillas v.*

[4] There would be little reason for Petitioner to do so, given how small a burden this represents and its intuitive fairness.

*United States*, 394 F.2d 785 (9th Cir. 1968)).[5] At a minimum, Petitioner failed to make plain its objection to the imposition of the "overt act" rule, and therefore did not adequately present the issue in "'the recent proceeding upon which the lower court[] relied for [its] resolution of the issue.'" *See Vonn*, 535 U.S. at 58 n.1. *See also Baldwin v. Reese*, 541 U.S. 27, 34 (2004) (declining to exercise its discretion to consider an argument that was not raised in the Court of Appeals or in petitioner's opposition to the petition for a writ of *certiorari*).

Second, because Petitioner also conceded the propriety of the district court's inclusion of the substantial step as an element in its charge to the petit jury, *see* U.S. Br. at 20 (9th Cir. filed Jan. 31, 2005), it cannot avail itself of this Court's opinion in *Williams*. While the Court in *Williams* found that review was not precluded by a similar, but not identical, concession in that case, it did so because the petitioner framed its concession in terms of an obligation imposed by Circuit authority that it had previously contested. *See United States v. Williams*, 504 U.S. 36, 44 (1992) (The government "conceded ... not that the responsibilities [the Circuit precedent] had imposed were proper, but merely that [the Circuit precedent] had imposed them – over the protests of the Government, but in a judgment that was nonetheless binding precedent for the panel below."). Here, however, the government did not merely assert that the petit jury instructions were correct in light of *Gracidas-Ulibarry*; it simply endorsed them without reservation or citation to authority. *See* U.S. Br. 20 (9th Cir. filed Jan 31, 2005). Based upon its concession, and its failure to object – at any

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[5] Although it describes its *mens rea* requirement for the offense of reentry as "general intent," *see Pena-Cabanillas v. United States*, 394 F.2d 785, 790 (9th Cir. 1968), *overruled on other grounds*, *United States v. Smith Baltiher*, 424 F.3d 901 (9th Cir. 2005), *Pena-Cabanillas* requires only that the defendant act voluntarily. *See id.* at 788-90. *But see Carter v. United States*, 530 U.S. 255, 269 (2000) (observing that general intent corresponds to knowledge as to the *actus reus*).

point – to a construction of section 1326's attempt offense as requiring a substantial step, the government has waived any argument that a section 1326 attempt does not require a substantial step.

### B. The Court Of Appeals Correctly Held That A Substantial Step Is An Element Of A Section 1326 Attempt Offense.

Because "it is a general principle that a party cannot be punished for an evil design, unless he has taken some steps towards carrying it out," *Bannon v. United States*, 156 U.S. 464, 469 (1895), a substantial step toward commission of the underlying offense is a fundamental constituent of an attempt offense.

> One of the basic premises of the criminal law is that bad thoughts alone cannot constitute a crime. This is no less true as to an attempt, and thus it is not enough that the defendant have intended to commit a crime. There must also be an act, and not any act will suffice.

2 LaFave, *supra* § 11.4, at 218 (footnotes omitted). *Gracidas-Ulibarry*'s determination that a section 1326 attempt offense requires a substantial step vindicates this tradition. *See* 231 F.3d at 1192, 1196. *Accord United States v. De Leon*, 270 F.3d 90, 92 (1st Cir. 2001) ("'Attempt,' [in a section 1326 attempt prosecution] as elsewhere, ... requires ... a substantial step toward completing [the] entry.") (citing *Gracidas-Ulibarry*, 231 F.3d at 1195-96).[6]

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[6] Two Circuits have disagreed with *Gracidas-Ulibarry*'s formulation of the specific intent requirement imposed by section 1326's use of the term "attempt," in that *Gracidas-Ulibarry* found that Congress did not intend to punish aliens attempting to enter the United States when those aliens believed that they had permission to apply to enter the United States. *Compare Gracidas-Ulibarry*, 231 F.3d at 1196, *with United States v. Rodriguez*, 416 F.3d 123 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 1142 (2006), *and United States v. Morales-Palacios*, 369 F.3d 442 (5th Cir.), *cert. denied*, 543 U.S. 825 (2004). Neither *Rodriguez* nor *Morales-Palacios* address the substantial step issue, although both require a heightened mens rea, particularly when compared to the *Pena-Cabanillas*

*Gracidas-Ulibarry* determined that section 1326's attempt offense included, as an element, a substantial step based upon Congress's use of the word "attempt," a term with a well-established common law meaning. *See Gracidas-Ulibarry* 231 F.3d at 1192 ("The common law meaning of 'attempt' is the specific intent to 'engage in criminal conduct and ... an overt act which is a substantial step towards committing the crime.'") (omission in original) (quoting *United States v. Arbelaez*, 812 F.2d 530, 534 (9th Cir. 1987)). As illustrated in Part I.B., *supra*, the Ninth Circuit's interpretation of the term "attempt" enjoys widespread support.

The Court's decision in *Carter v. United States*, 530 U.S. 255 (2000), supports *Gracidas-Ulibarry*'s reliance on the common law meaning of the term "attempt." As a threshold matter, section 1326 does not define the term "attempt" and there is no other federal statutory definition of the term upon which courts can rely. *See generally United States v. Dworken*, 855 F.2d 12, 16 (1st Cir. 1988). Resort to interpretive aids is therefore required.

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voluntariness standard. *See Rodriguez*, 416 F.3d at 128 (approving allegation that defendant "'knowingly and intentionally attempted to enter'"); *Morales-Palacios*, 369 F.3d at 449 (stating that "it is sufficient that the government demonstrates that a previously deported alien knowingly intended to reenter"). *Cf. Bailey*, 444 U.S. at 405 (determining that attempts require a "heightened mental state").

Although *Morales-Palacios* did not explicitly address the substantial step requirement, it suggested that it would apply a particularly rigorous approach to that element. Specifically, the Fifth Circuit found that the conduct of an alien who approached the border and asked questions of border personnel was "insufficient for an attempted entry because ... 'there [was] no evidence that the defendant actually applied for admission to the United States.'" *Morales-Palacios*, 369 F.3d at 448 n.4 (quoting *United States v. Morales-Tovar*, 37 F. Supp. 2d 846, 851 (W.D. Tex. 1999) (alteration in original)). Thus, the Fifth Circuit requires a substantial step that leaves no doubt about the defendant's intent to reenter the United States. *Compare Resendiz-Ponce*, 425 F.3d at 733 (noting that "[p]hysical crossing into a government inspection area is ... a substantial step toward entry into the United States").

*Carter* teaches that "[t]he canon on imputing common-law meaning applies only when Congress makes use of a statutory *term* with established meaning at common law." 530 U.S. at 264. Under *Carter*, then, the question is not whether section 1326 describes an offense based upon an analogous common law crime, but rather whether Congress has used a common law term. *See id.* at 265 ("a 'cluster of ideas' from the common law should be imported into statutory text only when Congress employs a common-law *term*"). *See also Evans v. United States*, 504 U.S. 255, 260 n.3 (1992) ("[A]s Justice Frankfurter advised, 'if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'") (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)). By employing the word "attempt," Congress imported a "cluster of ideas" from the common law, one of which is the notion that a substantial step is an element of every attempt offense. *See Gracidas-Ulibarry*, 231 F.3d at 1193 n.7 ("Here, of course, § 1326 does use the well-established common law term, 'attempts.'"). *See also id.* at 1193 ("Neither the text of § 1326 nor its legislative history gives any indication that Congress intended not to incorporate the common law meaning of the term 'attempts' into the crime of attempted illegal reentry.").

But even if reliance on the common law meaning of the term "attempt" were unwarranted, the Ninth Circuit's interpretation of the term is nonetheless consistent with the current meaning attributed to the term. Indeed, in the context of construing a statute closely related to section 1326 – 8 U.S.C. § 1101(a)(43)(U)[7] – the Second Circuit concluded that "the modern meaning of 'attempt' has evolved from the classic common-law definition of the term, and the elements of intent and a substantial step toward commission set out in

[7] The maximum sentence of a defendant convicted under 8 U.S.C. § 1326(a) turns on whether the alien was removed after having suffered a conviction for an offense qualifying as an aggravated felony under 8 U.S.C. § 1101(a)(43). *See* 8 U.S.C. § 1326(b)(2).

the Model Penal Code make up the most commonly used 'attempt' definition today." *See Ming Lam Sui v. INS*, 250 F.3d 105, 116 (2d Cir. 2001). *Accord United States v. Martinez-Garcia*, 268 F.3d 460, 465-66 (7th Cir. 2001) (adopting the analysis in *Ming Lam Sui*). The Model Penal Code formulation discussed in *Ming Lam Sui* is entirely consistent with the substantial step element as described in *Gracidas-Ulibarry*:

> A person is guilty of an attempt to commit a crime if, ... he ... purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

Am. Law Inst., *Model Penal Code*, § 5.01(1)(c) (1962). *See also id.* at § 5.01(2) (the substantial step must be "strongly corroborative of the actor's criminal purpose").

Finally, the construction of section 1326's attempt offense to include a substantial step element vindicates the Court's concern in *Bannon* that a defendant not be convicted solely for an "evil design, unless he has taken some steps towards carrying it out." *Bannon*, 156 U.S. at 469.

> The corroborative behavior [evidenced by a substantial step] is ... always a required element; without it, "firmness of purpose" cannot be guaranteed. That is, until the corroborative step is taken, there is insufficient indication, or proof, that the actor would actually follow through on a criminal design, even if that design has been affirmatively expressed.

*Dworken*, 855 F.2d at 17 n.3. *Accord United States v. Cruz-Jiminez*, 977 F.2d 95, 102 n.11 (3d Cir. 1992). The Ninth Circuit was correct in holding that a substantial step is an element of an attempt offense under section 1326.

### C. The Ninth Circuit Correctly Held That The *Mens Rea* For An Attempted Reentry Under Section 1326 Is The Intent To Reenter Without The Permission Of The Attorney General Or His Successor.

*Gracidas-Ulibarry* holds that to support a conviction for attempted reentry under 8 U.S.C. § 1326, the government must demonstrate, *inter alia*, that "the defendant had the purpose, i.e., conscious desire, to reenter the United States without the express consent of the Attorney General [or his designated successor]." *Gracidas-Ulibarry*, 231 F.3d at 1196. Two Circuits have disagreed, holding that the applicable *mens rea* is the intent to reenter the United States. *See United States v. Rodriguez*, 416 F.3d 123, 128 (2d Cir. 2005) (approving allegation that defendant "'knowingly and intentionally attempted to enter'"); *United States v. Morales-Palacios*, 369 F.3d 442, 449 (5th Cir. 2004) ("it is sufficient that the government demonstrates that a previously deported alien knowingly intended to reenter").[8] The instant case is not the appropriate vehicle to resolve this Circuit split; neither party raised the issue below,[9] and the question upon which the

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[8] *Gracidas-Ulibarry* rejected the Eleventh Circuit's decision in *United States v. Peralt-Reyes*, 131 F.3d 956 (11th Cir. 1997) (per curiam), as "provid[ing] no analysis other than the court's adoption of the holding of an unpublished First Circuit decision which has no precedential value." *See Gracidas-Ulibarry*, 231 F.3d at 1195 (citing *Peralt-Reyes*, 131 F.3d at 957 and *United States v. Reyes-Medina*, No. 94-1923, 1995 WL 247343 (1st Cir. Apr. 25, 1995)).

[9] The government has waived any challenge to *Gracidas-Ulibarry*'s formulation of the *mens rea* element. The Court "'will not review a question not pressed *or* passed on by the courts below.'" *Williams*, 504 U.S. at 42 (quoting *Springfield v. Kibbe*, 480 U.S. 257, 266 (1987)). The government never "pressed" the issue of the *mens rea* element; it never contended that *Gracidas-Ulibarry* was wrongly decided. Even so, *Williams* permits review where the lower court "passed" on the issue. *See Williams*, 504 U.S. at 43-45. While "[t]here [was] no doubt [in *Williams*] that the [lower court] decided the crucial issue," *id.* at 43, the same cannot be said here: Respondent's appeal addressed only the substantial step issue; the Court of Appeals did not "pass" on any *mens rea* issue. *See*

Court initially granted the petition for a writ of *certiorari* – whether a preserved objection to the omission of an element from the indictment was subject to harmless error review – concerned only the failure to allege a substantial step. As discussed above, there can be little dispute that such a substantial step is an element of every attempt offense, regardless of which formulation of the *mens rea* element is correct. Nevertheless, should the Court reach the issue, it should hold that the Ninth Circuit has correctly described the *mens rea* element for an attempted reentry under section 1326.

*Gracidas-Ulibarry*'s holding that attempted reentry into the United States requires a showing that "the defendant had the purpose, i.e., conscious desire, to reenter the United States without the express consent of the Attorney General [or his designated successor]," *see Gracidas-Ulibarry*, 231 F.3d at 1196, is compelled by the Court's cases. First, it derives a specific intent requirement from the Court's cases holding that Congress's use of a common law term indicates incorporation of the term's common law meaning. *See, e.g.*, *Carter*, 530 U.S. at 264. Second, it relies upon the Court's unwillingness to construe statutes not to require *mens rea* where the statute reaches a substantial amount of innocent conduct: "*Morissette*, reinforced by *Staples*, instructs that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994) (citing *Staples v. United States*, 511 U.S. 600 (1994), and *Morissette v. United States*, 342 U.S. 246 (1952)).

*1. Congress' Use Of The Common Law Term "Attempt" Imported A "Cluster Of Ideas" From The Common Law, Including The Necessity To Prove Specific Intent In An*

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*Resendiz-Ponce*, 425 F.3d at 731-33. Thus, the *Williams* exception to the normal rule that only preserved issues are subject to review by the Court is inapplicable.

*Attempt Offense.* *Gracidas-Ulibarry* first analyzed the common law background of the term attempt, *see* 231 F.3d at 1192-94, as is required by *Carter*. *See* 530 U.S. at 265 ("a 'cluster of ideas' from the common law should be imported into statutory text only when Congress employs a common-law *term*").[10] *Accord Whitfield v. United States*, 543 U.S. 209, 213 (2005) ("'absent contrary indications, Congress intends to adopt the common law definition of statutory terms'"). Based upon that background, the Ninth Circuit concluded that an attempt under section 1326 was a specific intent crime. *See Gracidas-Ulibarry*, 231 F.3d at 1192. Indeed, the Court has recognized that such offenses traditionally require a heightened *mens rea*. *See Bailey*, 444 U.S. at 405 ("[T]he law of inchoate offenses such as attempt and conspiracy [requires] a heightened mental state [that] separates criminality itself from otherwise innocuous behavior.") (citing Model Penal Code § 2.02 cmt. at 125

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[10] The Second and Fifth Circuits misunderstand, or perhaps simply overlook, *Carter* when they suggest that the fact "that § 1326 defines a statutory offense rather than enshrining in statute a common law offense" somehow "liberate[s]" the terms of the statute "from their common law meanings." *See Rodriguez*, 416 F.3d at 126 (citing *Morales-Palacios*, 369 F.3d at 447). In fact, those courts have the rule in *Carter* exactly backward. *Carter* focuses on the use of a common law *term*, not the question of whether a statute covers a common law offense. *See* 530 U.S. at 264. That is why the Court did not construe the bank robbery statute at issue to adopt the common law, even though the statute concerned a common law crime. *See id.* at 266-67. In short, the Court has "not hesitated to turn to the common law for guidance when the relevant statutory text does contain a term with an established meaning at common law." *Id.* at 266 (citation omitted). In contrast, the approach taken by the Second and Fifth Circuits counsels in favor of ignoring, rather than turning to, the common law when a common law *term* is employed, unless a common law offense is involved, *see Rodriguez*, 416 F.3d at 126 (acknowledging that "the common law generally imposes a heightened *mens rea* requirement for attempt crimes" but then ignoring that "established meaning"), while *Carter* requires consideration of the common law if common law terms are employed, regardless of the subject matter of the statute.

(Tent. Draft No. 4, 1955)). Specific intent is thus, one of the "cluster of ideas" associated with the common law term "attempt." *Gracidas-Ulibarry* therefore relied on *Bailey* to conclude that "[t]he reason for requiring specific intent for attempt crimes is to resolve the uncertainty whether the defendant's purpose was indeed to engage in criminal, rather than innocent, conduct." *See* 231 F.3d at 1193. "This accepted common law definition is the basis for the doctrine that the crime of attempt requires a showing of specific intent even if the completed crime does not." *Id.* at 1192 (internal quotation marks deleted) (quoting *United States v. Hadley*, 918 F.2d 848, 853 (9th Cir. 1990) and citing *United States v. Sneezer*, 900 F.2d 177, 179 (9th Cir. 1990), and 4 Charles E. Torcia, *Wharton's Criminal Law* § 695, at 591-97 (15th ed. 1996)).[11] By construing section 1326 to require that the government prove that the alien intended to enter without permission, *Gracidas-Ulibarry* vindicates the fundamental concerns identified in *Bailey*.

*2. The Background Presumption Of Mens Rea Supports The Ninth Circuit's Construction Of The Section 1326 Attempt Offense To Require An Intent To Enter Without The Requisite Permission Because Any Other Construction Would Criminalize A Broad Range Of Innocent Conduct.* The Ninth Circuit's construction is also supported by the Court's "presumption in favor of a scienter requirement [that] should apply to each of the statutory elements that criminalize otherwise innocent conduct." *X-Citement Video, Inc.*, 513 U.S. at 72. In *Staples v. United States*, 511 U.S. 600 (1994), the Court applied that presumption to the offense of possessing a machine gun in violation of 26 U.S.C. § 5861(d). Observing that statutory silence does not necessarily suggest

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[11] *See also* 2 LaFave, *supra* § 11.3(c) at 216 ("[E]ven if the completed crime may be committed without intent, knowledge, recklessness, or even negligence, the same is not true of an attempt to commit that crime. An attempt to commit a strict liability offense is thus possible only if it is shown that the defendant acted with an intent to bring about the proscribed result.").

that Congress intended to dispense with a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal, 511 U.S. at 605, *Staples* found that "'[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.'" *Id.* (alteration in original) (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978), and *Morissette*, 342 U.S. at 250).

In rejecting the government's claim that the firearm statute was a public welfare offense traditionally exempt from the *mens rea* requirement, the Court referred to several characteristics of the gun statute in requiring *mens rea.* Criminalizing mere possession would "'criminalize a broad range of apparently innocent conduct.'" *Id.* at 610 (quoting *Liparota v. United States*, 471 U.S. 419, 426 (1985)). Guns are not subject to a long tradition of regulation such as "'deleterious devices or products or obnoxious waste materials.'" *Id.* at 610-11 (quoting *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971)). While potentially dangerous, guns are not intrinsically dangerous and subject to such intense regulation as other recognized areas of regulation. *Id.* at 611-12. In contrast to the history of enforcing public welfare regulations with only fines or short jail sentences, the potentially harsh penalty attached to conviction – up to ten years imprisonment – was "a significant consideration in determining whether the statute should be construed as dispensing with *mens rea.*" *Id.* at 616. Consequently, *Staples* held that *mens rea* as to the facts that rendered the defendant's conduct unlawful was required. *See id.* at 619.

The Court applies the same analysis to the determination of whether a statute should be construed to require a specific intent element. *See Carter*, 530 U.S. at 269. In *Carter*, the Court noted that "some situations may call for implying a specific intent requirement into statutory text." *See id.* Specifically, the Court cautioned against construing a stature

to require only general intent if the "statute would run the risk of punishing seemingly innocent conduct." *See id.*

The concerns identified in *Carter* animated the Ninth Circuit's decision in *Gracidas-Ulibarry*: its construction was informed by the concern that if it failed to construe the statute to require specific intent, "lawful conduct could be swept within the proscription of the statute." *See* 231 F.3d at 1194. Absent a requirement that the defendant intended to enter the United States without permission, the Ninth Circuit noted that individuals seeking to comply with INS regulations may well be subject to liability.

> If attempted reentry were a general intent crime, a previously deported alien intercepted on the way to, or even at, the port of entry to make ... a request [for permission to reapply] or to pick up [waiver] forms could be prosecuted under § 1326. True, the alien could try to explain that his or her intent was to comply with the law, not to violate it; but the government would not have to prove beyond a reasonable doubt that the alien's true purpose was to break the law.

*Id.* Thus, *Gracidas-Ulibarry* applied a "presumption in favor of a scienter requirement ... to each of the statutory elements that criminalize otherwise innocent conduct." *X-Citement Video, Inc.*, 513 U.S. at 72 Specifically, it requires the intent to enter and knowledge as to the lack of permission to reapply.

The Ninth Circuit illustrated its concerns by citing *Morales-Tovar*, 37 F. Supp. 2d 846. In *Morales-Tovar*, a previously deported alien went to a port of entry with his Mexican birth certificate and asked to reapply for a resident alien card. *See id.* at 847-48. Although he did not apply for admission, he was arrested and prosecuted for attempted reentry. Absent a requirement that the alien intend to enter without permission, section 1326's attempt offense would reach the innocent conduct described in *Morales-Tovar*. *See Gracidas-Ulibarry*, 231 F.3d at 1194; *Morales-Tovar*, 37 F. Supp. 2d at 851.

*3. The Approach Taken By The Second And Fifth Circuits Disregards* Carter *And Fails To Apply The Background Presumption Of* Mens Rea. The Second and Fifth Circuits do not persuasively argue that Congress intended to subject innocent conduct, such as that of the defendant in *Morales-Tovar*, to felony prosecution.[12] First, as noted above, those courts misapply *Carter*'s rule of statutory construction: they erroneously disregard the common law meaning of the statutory term "attempt." *See Carter*, 530 U.S. at 264. Nor does the fact that section 1326 is a statutory, rather than common law, offense suggest that the background presumption of *mens rea* does not apply. In fact, the Court has repeatedly adopted constructions including *mens rea* requirements in purely statutory offenses. *See, e.g., Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513 (1994) (drug paraphernalia); *Staples*, 511 U.S. 600 (possession of unregistered firearms); *Liparota v. United States*, 471 U.S. 419 (1985) (unlawful acquisition and possession of food stamps); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) (antitrust violations).[13]

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[12] The Fifth Circuit's attempt to account for the result in *Morales-Tovar* is singularly unpersuasive. Rather than rely upon that defendant's innocent intent, *Morales-Palacios* claims that the *Morales-Tovar* defendant is not liable because he made no application for admission. *See Morales-Palacios*, 369 F.3d at 448 n.4. That approach, however, would lead to incongruous results. For instance, if a previously deported alien were in line at a port of entry, intending to attempt to enter by making a false claim to citizenship and knowing full well that he lacked permission to reapply, but was recognized as a deportee by border personnel before he applied for entry, the Fifth Circuit would apparently hold that he has not violated section 1326. The Ninth Circuit's interpretation, however, would permit conviction of that defendant, but would not reach the innocent conduct of the *Morales-Tovar* defendant. *See Resendiz-Ponce*, 425 F.3d at 733 (noting that "[p]hysical crossing into a government inspection area is ... a substantial step toward entry into the United States").

[13] *See also Posters 'N' Things*, 511 U.S. at 523 ("Even statutes creating public welfare offenses generally require proof that the defendant had

Second, *Rodriguez* and *Morales-Palacios* erroneously rely on deportation proceedings themselves to conclusively presume that all section 1326 defendants are aware that they lack permission to reapply for admission. *See Rodriguez*, 416 F.3d at 128; *Morales-Palacios*, 369 F.3d at 448. As a threshold matter, not all section 1326 defendants have had deportation (or removal) proceedings; section 1326 also applies to aliens who have merely been "denied admission." *See* 8 U.S.C. § 1326(a)(1). Even if a defendant is granted an actual hearing, the Second Circuit's inference of knowledge from INS "practices" is problematic given the frequent defects in these streamlined administrative proceedings. *See, e.g.*, *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1047 (9th Cir. 2004) (proceedings not translated); *United States v. Lopez-Vasquez*, 1 F.3d 751 (9th Cir. 1993) (mass deportation hearing with waivers of rights by silence). But even a perfect deportation hearing is unlikely to inform an alien like Morales-Tovar that he may subject to liability for a twenty-year maximum felony if he requests the Attorney General's permission to reapply for admission at a port of entry. At any rate, the Court has held that, in an escape case, the prosecution must demonstrate "that an escapee knew his actions would result in his leaving physical confinement without permission." *See Bailey*, 444 U.S. at 408. It would be anomalous if Congress were, by its silence as to *mens rea*, to treat an alien wishing to reapply for admission with less solicitude than an inmate seeking to leave custody. Knowledge of the lack of permission should be an element as to both offenses.

Nor can the Second Circuit's claim that "the clarity of the statutory language," *see Rodriguez*, 416 F.3d at 128, supports rejection of the well-established common law meaning of that statutory term "attempt" be reconciled with the Court's *mens rea* cases. "'Certainly far more than the simple omission of

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knowledge of sufficient facts to alert him to the probability of regulation of his potentially dangerous conduct.").

the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement.'" *Posters 'N' Things*, 511 U.S. at 522 (quoting *United States Gypsum*, 438 U.S. at 438). *Accord Liparota*, 471 U.S. at 426 ("the failure of Congress explicitly and unambiguously to indicate whether *mens rea* is required does not signal a departure from [the] background assumption [of *mens rea*]") (emphasis omitted).

Finally, imposition of liability despite an alien's good belief in his permission to reapply to reenter is analogous to strict liability and would improperly expand the public welfare doctrine to encompass attempted illegal reentry. The Court should reject any such expansion. Public welfare offenses giving rise to strict liability are those designed to criminalize "a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety." *Liporata*, 471 U.S. at 433. To determine if a statute "defines a public welfare offense, a court must have in view some category of dangerous and deleterious devices that will be assumed to alert an individual that he stands in 'responsible relation to a public danger.'" *Hanousek v. United States*, 528 U.S. 1102, 1103 (2000) (Thomas, J., dissenting from denial of petition for a writ of certiorari) (citing *Staples*, 511 U.S. at 613 n.6). As such, public welfare offenses regulate "dangerous or deleterious devices or products or obnoxious waste materials." *United States* v. *Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1997).

No matter how acrimonious the immigration debate has become in this country, we have certainly not sunk to labeling human beings as "obnoxious waste materials." Despite the longstanding and near total control Congress has exercised over immigration matters, that regulation is of a qualitatively different type than that exercised to regulate shipments of legal drugs, *see United States v. Dotterweich*, 320 U.S. 277, 281 (1943) (imposing strict liability for shipments of

misbranded or adulterated drugs), or waste materials, *see International Minerals & Chem.*, 402 U.S. at 565. This Court has not construed the public welfare doctrine so broadly as to hold "that any statute can be described as creating a public welfare offense so long as the statute regulates conduct that is known to be subject to extensive regulation and that may involve a risk to the community." *Hanousek*, 528 U.S. at 1104 (Thomas, J., dissenting).

Further, strict liability is inappropriate where severe sanctions can be imposed. In *United States Gypsum*, 438 U.S. at 442 n.18, the Court observed that the "severity of the[] sanctions" available under the Sherman Act, 3 years in prison and large fines, supported the conclusion that strict liability was inappropriate. *Accord X-Citement Video*, 513 U.S. at 72 (10 years); *Staples*, 511 U.S. at 616-17 (10 years). *See also* Francis B. Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 72 (1933) ("To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice ...."); *Hanousek*, 528 U.S. at 1103-04. The maximum sentence for a violation of section 1326 is twenty years, *see* 8 U.S.C. § 1326(b)(2), yet neither the Second nor Fifth Circuits address the incongruity in imposing such severe punishments for potentially innocent conduct.[14]

## CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

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[14] As a final consideration, this Court has also noted that "requiring *mens rea* is in keeping with our longstanding recognition of the principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Liparota*, 471 U.S. at 427 (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)).

Respectfully submitted,

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October 27, 2006

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(10)

No. 05-998

Supreme Court, U.S.
FILED
MAR 9 - 2006
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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA

Petitioner,

v.

JUAN RESENDIZ-PONCE,

Respondent.

COPY

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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# MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
(Supreme Court Rule 39)

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v.

JUAN RESENDIZ-PONCE,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

# RESPONDENT'S BRIEF IN SUPPORT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the indictment's failure to state essential facts constituting the necessary overt act, coupled with an incorrect explanation of the nature of the charge, deprives the court of the "structure" necessary for harmless error review.

2. Whether, if harmless error analysis is required, review of preserved error should be reviewed in the same manner as unpreserved error.

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## LEGAL ARGUMENT

1. Synopsis Of the Case Below:

Respondent was charged with Attempted Reentry After Deportation in violation of 8 U.S.C § 1326(b)(2). The indictment (Appdx "1") alleged neither an overt act nor any "essential facts" which could constitute such overt act. A necessary element of the offense of attempt is an overt act in furtherance of an intention to reenter the United States after having been deported. As stated in the En Banc decision in United States v. Gracidias-Ulibarry, 231 F.3d 1188, 1196 (9th Cir. 2000): "we hold the elements of the crime of attempted illegal reentry into the United States under 8 U.S.C. § 1326 are: ... (2) that the defendant committed an overt act that was a substantial step toward reentering without consent". (Emphasis supplied).

In accordance with Rule 51(b), and as both authorized and required by Rule 12(b)(3)(B), respondent preserved the claimed error by a timely and proper pretrial motion. He alleged the defect in the indictment and argued that the government had not provided notice of the nature and contents of its allegation.

The government responded that in its view it had complied with Rule 7(c)(1) and stated that: "the overt act of an attempt... is the entry itself". No further information was provided. (Appdx "2").

The Court Of Appeals ruled the overt act "obviously cannot be identified with the ultimate legal question of guilt or innocence". It also rejected the government's claim that the charge of attempt necessarily implied an actual entry. (p.4a of Appdx (A) following Pet For Cert, Resendiz, 425 F.3d at 732). It further alluded to various possible overt acts which the government could have charged but did not charge; namely, "the physical crossing of the border", "the bogus identification card", "lying to an inspection officer".

The Solicitor does not dispute the necessity of an overt act and does not dispute that it was not in the indictment. (See Footnote 3 on page 9 of Pet For Cert). The sole dispute is the appropriate remedy.

2. Legal Argument:

The rule which governs the "Nature and Contents" of an indictment is Rule 7(c)(1) of the Federal Rules Of Criminal Procedure. Neither the government nor the circuit judges dissenting from denial of En Banc review in United States v. Omer, 429 F.3d 835 (9th cir. 2005), have addressed the applicable rule. However, it provides:

> **(c) Nature and Contents.**
> **(1) In General.** The indictment or information must be a plain, concise and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government.
> (Emphasis supplied).

Rule 7(c) represents an embodiment of the constitutional requirement that all essential elements of an offense must be formally charged. United States v. Russell, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962). And, in United States v. Hamling, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974) this Court ruled:

> ... the language of the statute ... must be accompanied by such statement of facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged. (Internal quotes omitted).
> (94 S.Ct. at 2908).

As far back as 1927, this Court stated the constitutional rule to be that a valid indictment: "shall advise the defendant of the nature and cause of the accusation in order that he may meet it and prepare for trial, and after judgment, be able to plead the record and judgment in bar of a further prosecution for the same

offense". Wong Tai v. United States, 273 U.S. 77, 80-81, 47 S.Ct. 300, 301, 71 L.Ed. 545, 547 (1927).

The rules make a distinction between error which is preserved (Rule 51(b) – Preserving Claimed Error) and error raised for the first time on appeal (Rule 52(b) – Plain Error). The Solicitor seeks to eliminate this distinction and treat all errors alike whether preserved or not, under Rule 52(a) – Harmless Error. Six Circuit Judges are of the same viewpoint as stated sub nom United States v. Omer, 429 F.3d 835 (9th cir. 2005)("That a defendant brings a timely objection, standing alone, cannot be sufficient to create an exemption from the general rule that errors having no effect on the outcome of a proceeding must be disregarded. See Fed.R. Crim.P. 52(a)." Thus, only errors which are "structural" would be exempt from harmless error review regardless of whether or not the error had been preserved. The remaining members of the Ninth Circuit, presumably, are of the opinion that the distinction between preserved and unpreserved error should be continued. That difference of opinion is the essence of the complained-about decision in United States v. Du Bo, 186 F.3d 1177, 1179 (9th Cir. 1999)(constitutional error not subject to harmless error analysis "if properly challenged prior to trial").

The government's position conflicts with this Court's ruling in United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (9th Cr. 1985). There, this



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Court spoke against "unwarranted extension" of Rule 52(b) plain error and spoke of:

> ... the Rule's "careful balancing of our need to encourage trial participant's to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed" (quoting United States v. Frady, 456 U.S. at 162, 102 S.Ct. at 1592). Reviewing courts are not to use the plain error doctrine to consider trial errors not meriting review absent timely objection. (105 S.Ct. at 1046).

The second issue presented is whether the total omission of any essential facts in violation of Rule 7(c)(1) is "structural" or whether it should be reviewed under harmless error standards. The unique feature of this case is that the government not only violated Rule 7(c)(1) but also provided misinformation as to the nature of its allegation. It stated: "the overt act of an attempted reentry is the entry itself". (Resendiz at 732). It was not until the Court Of Appeals issued its ruling that this information was eliminated as a "non-starter" in that it coincides "with the ultimate legal question of guilt or innocence". (Id.).

Respondent submits that trial on a charge that is not made, or is misrepresented, is the type of error that is "fundamentally unfair" and which "infects the framework within which the trial proceeds". (Neder, 119 S.Ct. at 1833). It is the charge that frames the issues to be decided at trial. A defendant's right to be tried only a charge presented by a grand jury and to be accurately

informed of the nature of the allegation are rights that should be classified as "substantial". (U.S. Constitution, Amdt VI).

Ordinary error is often referenced as "trial error". That phrase refers to something that happens at a trial – such as a jury instruction that omits an element as in Neder. At a trial a record is made which is reviewable. The context and therefore the significance of the error can be compared with everything else. Here, however, the government still has not provided information as to what discrete act this court should consider as having been the overt act that resulted in conviction. Granted that respondent did "something". But, there is no assurance that the "something" was in furtherance of the intended attempt to illegally reenter. If the overt act was, for instance, "lying to an inspection officer" respondent may have been attempting to extricate himself because he instantly aroused suspicion and was being referred to secondary inspection. If the overt act was ""tendering of the bogus identification card" respondent may have explained that the documents were valid and he wished to inquire if they could be used for his entry. On the other hand, there are "a number of other acts that the government might have alleged as a substantial step toward entry into the United States". (Resendiz at 733).

Conjecture as to what the overt act might have been, as to respondent's explanation, and as to the uncertainty of how a jury would have resolved the unpresented matters place this case under Sullivan v. Louisiana, 508 U.S. 275, 113

S.Ct. 2078, 124 L.Ed.2d 182 (1993) concerning a constitutionally deficient instruction on reasonable doubt. There, the Court ruled the error to be structural due to the uncertainty of how the jury would have reacted under a proper reasonable doubt instruction. The Court refused to engage in speculation outside of the record as to whether "a jury *would surely have found* petitioner guilty beyond a reasonable doubt" (113 S.Ct. at 2082) and focused inquiry on "whether the guilty verdict actually rendered in *this* trial was surely attributable to the error". (Id.2081).

Here, the government's argument, basically, is that surely Resendiz did something to carry out his intention to illegally reenter the United States albeit that "something" has never been identified. The government's argument asks the Court to engage in off-the-record speculation that amounts to the same type of "directed verdict for the State" that is constitutionally condemned in Sullivan. Here, as in Sullivan, there is no record to review. The error must be deemed to be structural because it is not amenable to quantitative analysis. The misdescription of the burden of proof in Sullivan results in the same type of pure speculation as does the misdescription of the charge in the present case. True, the record contains any number of acts which might have been the necessary overt act – but none have been identified as such. Without knowing what act the government claims is the

overt act there is no structural framework under which the harmlessness of the error could be reviewed.

Finally, the Solicitor insinuates that the admitted error in this case is: "an element of the offense ... inadvertently omitted from a federal indictment, whether because of prosecutorial oversight or simply because of uncertainty as to what constitutes an offense element". (Cert. Pet, p.17). Here, there is nothing uncertain about the overt act being an element. (See, Gracidias, supra). And, there is nothing uncertain about the requirements of Rule 7(c) since the government was provided a timely and appropriate motion detailing its omission of "essential facts" from the indictment. Respondent presents this observation in accordance with Supreme Court Rule 15(2).

## CONCLUSION

In conclusion, this court should grant certiorari and rule: (1) that the distinction between preserved error and plain error is sound; and, (2) that this case lacks the structure and framework necessary for harmless error review.

DATED: March 6, 2006.

Respectfully submitted,

Atmore Baggot

Atmore Baggot, Esq.
CJA Counsel Of Record For Respondent

## CERTIFICATE OF SERVICE

I hereby certify that on or prior to Monday, March 6, 2006, I placed two (2) copies of this Respondent's Brief In support Of Certiorari in the United States mail, postage prepaid,

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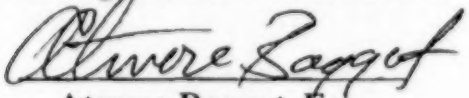

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# APPENDIX "1"

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DISTRICT OF ARIZONA
BY ____ DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

United States of America,

Plaintiff,

v.

Juan Resendiz-Ponce,
aka: Juan Ponce Resendiz,

Defendant.

NO. CR03-810-PHX EHC

**INDICTMENT**

VIO: 8 U.S.C. §§ 1326(a) and enhanced by (b)(2)

(Attempted Reentry After Deportation)

THE GRAND JURY CHARGES:

On or about June 1, 2003, JUAN RESENDIZ-PONCE, an alien, knowingly and intentionally attempted to enter the United States of America at or near San Luis in the District of Arizona, after having been previously denied admission, excluded, deported, and removed from the United States at or near Nogales, Arizona, on or about October 15, 2002, and not having obtained the express consent of the Secretary of the Department of Homeland Security to reapply for admission.

In violation of Title 8, United States Code, Sections 1326(a) and enhanced by (b)(2).

A TRUE BILL

John T. Zeglis

FOREPERSON OF THE GRAND JURY
Date: July 30, 2003

PAUL K. CHARLTON
United States Attorney
District of Arizona

Lisa J. Settel for

MARY BETH PHILLIPS
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# APPENDIX "2"

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

| | |
|---|---|
| United States of America,<br><br>Plaintiff,<br>v.<br><br>Juan Resendiz-Ponce,<br>aka; Juan Ponce Resendiz<br><br>Defendant. | No.CR 03-810-PHX-EHC<br><br>**GOVERNMENT'S RESPONSE TO MOTION TO DISMISS INDICTMENT** |

The United States of America, by and through undersigned counsel, hereby responds to defendant's motion to dismiss the indictment. In support of this response, the government provides the following Memorandum of Points and Authorities.

## MEMORANDUM OF POINTS AND AUTHORITIES

An indictment must allege the elements of the offense charged and the facts which inform the defendant of the specific offense with which he is charged. Pernillo-Fuentes, 252 F.3d 1030, 1031 (9th Cir. 2001). In construing the language of the indictment courts must be guided by common sense and practicality. United States v. Christopher, 700 F.2d 1253 (9th Cir. 1983). Attempted entry in violation of 8 U.S.C. 1326 essentially requires two elements: (1) the specific intent to reenter without consent; and (2) an overt act that was a substantial step towards reentry. United States v. Leos-Maldonado, 302 F.3d 1061, 1063 (9th Cir. 2002).

The defendant relies on United States v. Gracidias-Ulibarry in his argument that the indictment failed to allege specific intent since it stated that he "knowingly and intentionally" attempted to enter the United States, 231 F.3d 1188, 1196 (9th Cir. 2000). In Gracidias-Ulibarry, the Court found constitutional error when the district court failed to instruct the jury on the specific intent element of reentry. Id. at 1198. There, the trial court instructed the jury that it should convict Gracidias if it merely found that he "attempted to reenter the United States" instead of finding that he "intended" to enter the United States. Id. at 1191. The defendant also relies on Pernillo-Fuentes which held that an indictment that alleged only that the defendant "attempted to enter the United States" was fatally flawed. 252 F.3d at 1032. The facts of these cases are distinguishable from the instant case. Here, in contrast to mere attempt, the indictment alleges that the defendant "knowingly and intentionally" attempted to enter the United States.

Furthermore the indictment does allege the specific intent required in Gracidias-Ulibarry. The terms knowingly and intentionally constitute willfulness. United States v. Morales, 108 F.3d 1031, 1036 (9th Cir. 1997). "Willful" in the criminal context includes a specific intent to do an act forbidden by law. United States. v. Drew, 722 F.2d 551(9th Cir. 1983). In this case, the indictment states that the defendant "knowingly and intentionally" attempted to enter the United States and thus specific intent is alleged.

The defendant also alleges that the indictment failed to allege an overt act. Attempted reentry is not an attempt to commit an independently described offense, in the sense in which the word "attempt" is ordinarily used in criminal law, but it is the actual reentry into the United States. United States. v. Corrales-Beltran, 192 F.3d 1311, 1319 (9th Cir. 1999). Attempted entry occurs when a previously deported alien makes an effort or tries to reenter the United States. United States v. Leos-Maldonado, 302 F.3d 1061, 1064 (9th Cir. 2002). It is the act of crossing the boundary line into the United States. Id. In this case, the indictment alleges that the defendant attempted to enter the United States at or near San Luis, Arizona on or about October 15, 2002. Since the overt act of an attempted entry crime is the entry itself and the indictment stated the date and place of the defendant's reentry, the indictment sufficiently alleges an overt act.

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**Conclusion**

For the foregoing reasons the defendants motion to dismiss the indictment should be denied.

Respectfully submitted this 17th day of November, 2003.

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United States Attorney
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Original filed and copy of the foregoing mailed this 17th day of November 2003, to:

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Supreme Court, U.S
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No. 05-998

In The

# Supreme Court of the United States

UNITED STATES OF AMERICA,

*Petitioner,*

v.

JUAN RESENDIZ-PONCE,

*Respondent.*

**On Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Ninth Circuit**

## BRIEF OF RESPONDENT

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## SUMMARY OF RESPONDENT'S ARGUMENT

1. The Fifth Amendment provides the only means of charging a person with commission of a crime against the government. When a grand jury indictment is "constitutionally deficient", as admitted in this matter, it is not in compliance with the Fifth Amendment. Unlike most other constitutional errors, the Fifth Amendment provides an explicit remedy, namely, that a person "shall not be held to answer". The Federal Rules of Criminal Procedure cannot negate or otherwise override a constitutional imperative. Whatever force Rule 52(a) may have against the Fifth Amendment remedy, it is counterbalanced by Rule 34(a)(1) which requires an arrest of judgment if "the indictment . . . does not charge an offense". As described recently in *United States* v. *Gonzales-Lopez*, 548 U.S. ___, 126 S.Ct. 2557, 2564 n.4 (2006), an error is denominated structural if "the harmless error inquiry is irrelevant to remedying the constitutional error". Here, the Fifth Amendment applies to the guilty as well as the innocent. Neither may be held to answer if the indictment is constitutionally deficient.

This Court has recognized that the Fifth Amendment contains a "right not to be tried" independent of any prejudice or unfairness in the merits trial, in its decision in *Midland Asphalt* v. *United States*, 489 U.S. 794 (1989). Where an indictment contains a "fatal flaw" or "fatal defect", it ceases to be an indictment and falls under the categorization of "a defect so fundamental that it causes . . . *the indictment no longer to be an indictment*" and gives rise to "the constitutional right not to be tried". (Id. 802). (Emphasis supplied). To define a crime, it is necessary that the indictment include "every fact that is by law a basis for imposing or increasing punishment". *Apprendi* v. *New*

*Jersey*, 530 U.S. 466, 501 (2000) (Thomas, J. concurring). An indictment invalid on its face due to omission of an element is no accusation at all. It may not be the basis for imposing punishment.

Since the earliest days of the Republic, a solid line of precedent has established that automatic reversal of a verdict is the required remedy when a reviewing court determines that the indictment does not charge any offense. The government cannot point to any precedent for its novel view that a single judge, or a reviewing panel, can hypothesize what a grand jury might have done had they been present and listened to the evidence presented to the petit jury. The Solicitor's view that the charge can be adapted to whatever evidence might have been presented at the merits trial, is contrary to common fairness as well as more than a century of precedent.

2. Alternatively, under recent decisions, applicability of the procedural rule (Rule 52(a)), turns on whether preserved constitutional error affects the "structure" of the entire case or whether it may be characterized as a component part, which is "trial error". A second dimension in the analysis is whether the severity of the error can be evaluated against the backdrop of the entire case and excised, which is "reviewability". Respondent contends that where there is not any offense charged, there is no "structure" at all. And, no court can review the significance of the failure to identify an element where the element has never been identified. At best, the government argument is simply that "surely the grand jurors would have selected some discrete act if the matter had been properly presented to them".

The difficulty with the government position is that there is no way to ascertain which of many acts a reasonable grand jury would have selected as the overt act. Nor is there any way to discern how respondent would have reacted as to whether the selected act was in furtherance of his plan to illegally reenter the United States after having been deported. In short, the omission in this case is more like *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) where the jury instruction on reasonable doubt required an unwarranted guess as to what the petit jury would have concluded if it had been properly instructed. The error was ruled to be "structural" and unreviewable. In contrast, omission of a single element from a jury instruction can be evaluated in the context of whether the trial turned on that particular element and/or whether a second trial would simply be an instant replay of the first trial. *Neder* v. *United States*, 527 U.S. 1 (1999).

3. Finally, the overt act identified by the government outside of the indictment was prejudicial because as a matter of law it could not be an overt act. In her closing argument, the prosecutor belatedly identified reentry into the United States as the long hidden overt act. The unchallenged decision of the Court of Appeals was that as a matter of law an overt act "cannot be identified with the ultimate question of guilt or innocence". *United States* v. *Resendiz-Ponce*, 425 F.3d 729 (9th Cir. 2005). Thus, there was "prejudice".

## LEGAL ARGUMENT

### I. PROCEDURAL RULE 52(a) CANNOT VALIDATE A CONSTITUTIONALLY DEFICIENT INDICTMENT OVER THE FIFTH AMENDMENT PERSONAL GUARANTEE THAT "NO PERSON SHALL BE HELD TO ANSWER".

The Constitution authorizes only a single means of initiating a federal criminal prosecution. *United States* v. *Calandra*, 414 U.S. 338 (1974). The Fifth Amendment states:

> No person shall be held to answer for a . . . infamous crime, unless on a presentment or indictment of a Grand Jury, . . . ; nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb.

Under the circumstances of this case, the Solicitor has conceded that the "the indictment in this case was constitutionally deficient because it did not allege the commission of an overt act that was a substantial step toward unlawful reentry". (U.S. Br. at 10, n.2).

A cardinal rule is to view the clause in question in the context in which it occurs and in its cluster of guarantees. *United States* v. *Balsys*, 524 U.S. 666, 673 (1998). Viewed as a whole, the Fifth Amendment is specifically designed to provide individual guarantees as against the federal government. It is not designed for the convenience of the government. As part of the Bill of Rights, the Grand Jury Clause was "manifestly intended mainly for the security of personal rights". *Ex Parte Bain*, 121 U.S. 1, 6 (1886). Its historical development was described in *Duncan* v. *Louisiana*, 391 U.S. 145, 155 (1968): "Objections to the Constitution because of the absence of a bill of rights were

met by immediate submission and adoption of the Bill Of Rights".

Another familiar rule of interpretation is that no word, phrase, or sub-clause is intended to be without meaning. Since the Grand Jury Clause contains its own particular remedy, namely, that he shall "not be held to answer", that phrase must have been intended to have some meaning.

This Court has ruled that the phrase "no person shall be held to answer" confers a right-not-to-be-tried independent of the merits of a matter in two separate instances. In *Midland Asphalt* v. *United States*, 489 U.S. 794, 802 (1989) the Court held that: "a defect so fundamental that it causes the grand jury no longer to be a grand jury, *or the indictment no longer to be an indictment*, gives rise to the constitutional right not to be tried". (Emphasis supplied). In *Midland*, an isolated breach of grand jury secrecy did not give rise to the "right not to be tried". There, the court contrasted Rule 6 violations with the Fifth Amendment "explicit . . . constitutional guarantee that trial will not occur". The Court observed "a crucial distinction between a right not to be tried and a right whose remedy requires dismissal of charges". (Id. 801). Similarly, in *United States* v. *MacDonald*, 435 U.S. 850 (1978) the Court ruled that denial of the right to Speedy Trial did not cause the indictment "no longer to be an indictment" but said of the issue in the present case:

> Dismissal of the indictment is the proper sanction . . . when his indictment is defective. . . . Obviously, however, this has not led the court to conclude that such defendants can pursue interlocutory appeals.
>
> (435 U.S. at 860, n.7).

The question of what causes an indictment "no longer to be an indictment" has never been squarely addressed other that the *MacDonald* footnote above. A circuit court decision directly in point is *United States* v. *Bird*, 342 F.2d 1045 (9th Cir. 2003). It squarely concluded that: "the Government's failure to allege an essential element of a charged offense is a fundamental defect in an indictment that gives rise to a right not to be tried" based on *Midland* and *MacDonald*. Subsequently, the *Bird* opinion was withdrawn (357 F.2d 1082) and superseded by a procedural ruling disallowing an interlocutory appeal of the question. (359 F.2d 1185).

Under common law, an indictment lacking a necessary element was "no accusation at all" as reported in 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872):

> any accusation which lacks any particular fact which the law makes essential to the punishment is . . . *no accusation within the requirements of the common law, and it is no accusation in reason.*
>
> (Emphasis supplied).

A fair summary of the prior decisions of this Court is contained in *United States* v. *Calandra*, 414 U.S. 338, 345 (1974): "an indictment valid on its face is not subject to challenge on the ground that the Grand Jury acted on the basis of inadequate or incompetent evidence". Similarly, in *United States* v. *Costello*, 350 U.S. 359, 364 (1956) the court concluded that: "An indictment . . . if valid on its face, is enough to call for trial of the charge on the merits".

In this case, however, the indictment is not valid on its face as the Solicitor concedes. In such situations, this Court's precedents have uniformly dismissed the invalid

indictment at the appellate level and have automatically vacated the judgment. Once an appellate court dismisses the indictment, the judgment and sentence cannot stand. Although the basis of many decisions is not explicitly stated, respondent submits that when an indictment has been ruled on appeal to be constitutionally deficient, the indictment at that point ceases to be an indictment and the Court has retroactively employed the remedy "No person shall be held to answer".

This Court's precedents have been uniformly in support of the remedy of automatic reversal and have supported respondent's position for more than a century. In early days, the procedure was labeled "arrest of judgment". Although not frequently employed in modern times, the procedural rule is still preserved in Rule 34(a)(1). It mandates that "the court must arrest judgment if . . . the indictment . . . does not charge an offense". Early cases include *United States* v. *Cook*, 17 Wall. 174, 175 (1872) (if each and every element is not set out "the indictment will be bad" and judgment may be arrested even after verdict); *United States* v. *Cruikshank*, 92 U.S. 542, 559 (1875) (if element missing indictment is "so defective that no judgment of conviction should be pronounced and any judgment should be arrested"); and, *United States* v. *Carll*, 105 U.S. 611, 613 (1881) (element-omission is matter of substance, not form, and indictment is insufficient even after verdict).

In *Ex Parte Bain*, 121 U.S. 1 (1886), overruled in part on other grounds by *Mechanik*, supra, the Court granted a writ of habeas corpus because a trial judge had deleted certain wording from the indictment. Apart from expansive concepts of jurisdiction, the applied remedy was automatic reversal of the verdict. To do otherwise "would

place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney" thus forcing the citizen to undergo "the trouble, expense, and anxiety of a public trial before a probable cause is established". (*Bain*, 121 U.S. at 12).

In *Batchelor* v. *United States*, 156 U.S. 426 (1895), a district judge had denied a timely pretrial motion to dismiss an indictment for failure to include an element. That indictment contained a general allegation but did not "fully and clearly set forth every element necessary to constitute the offence". (Id. 429). This Court concluded that the omission did not "enable him to defend himself against it, or plead an acquittal or conviction in bar of a future prosecution for the same cause". (Id. 429). The remedy was dismissal of the indictment and vacation of the verdict apart from any consideration of the strength of the government's case.

In *Stirone* v. *United States*, 361 U.S. 212 (1960), the indictment charged interstate movement of sand but the proof also showed interstate movement of steel. The Court ruled squarely:

> While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed defendant's substantial right to be charged tried only on charges presented in an indictment returned by a grand jury. *Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error.* Citation. The very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens

> acting independently of either prosecuting attorney or judge.
>
> (361 U.S. at 274). (Emphasis supplied).

The next decision was *United States* v. *Russell*, 369 U.S. 749 (1962). The indictment provided the generic description of the element but did not provide "essential facts" as to how the generally stated element had been violated. In dismissing the indictment after jury verdict, this Court said that the vice was: "A cryptic form of indictment . . . requires the defendant to go to trial with the chief issue undefined . . . the indictment left the prosecution free to roam at large – to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal". (369 U.S. at 766, 768). The *Russell* decision is particularly apropos in this matter because the government's identification of the required overt act has constantly shifted as more fully explained in Arguments II and III.

Also in 1962, in the case of *Silber* v. *United States*, 370 U.S. 717 (1962) there was a "timely motion to dismiss the indictment, made in accord with F.R.Crim.Pro. 12(b)(2)" which was erroneously denied by the District Court. Although neither presented on appeal nor briefed nor argued, this Court sua sponte recognized the error as plain under Rule 52(b) without discussion. The test applied was whether the obvious error "affect(s) the fairness, integrity, or public reputation of judicial proceedings". It was not based on whether the outcome of the jury trial would have been the same. (370 U.S. at 317).

Adoption of the Solicitor's argument would necessarily require overruling this long line of precedent which goes back more than a century. In contrast, the government can

produce no authority to support its novel, and self-serving, test based upon a judge's view of what a hypothetically "properly instructed grand jury" would have done had they listened to all evidence at the merits trial. (U.S. Br. at 35-36).

In each of the foregoing precedents, this Court's chosen remedy was to do what the district judge should have ordered in the first instance, namely, to dismiss the indictment. In each of the foregoing decisions, the accused had insisted upon his constitutional rights in a proper way at the proper time. The government at that point had ample opportunity to return to the grand jury to cure the error or, possibly, to remedy the error by providing notice by other means, or, possibly, by obtaining a waiver from the defendant. But, it did not. By necessary implication, the Court's conclusion was that the accused should not "be held to answer" based on an "indictment that was not an indictment" using the terminology from *Midland*, supra, and *MacDonald*, supra.

There is even more precedent. In 1932, the Court decided *United States* v. *Hagner*, 285 U.S. 427, 433 (1932) which ruled that a post-verdict challenge to the sufficiency of the indictment by way of motion in arrest of judgment came too late. But, the Court opined "without deciding that the indictment would have been open to some form of challenge at an earlier stage of the case".

In *Illinois* v. *Somerville*, 410 U.S. 458, 475 (1973) there was a mid-trial realization that the indictment did not contain an essential element. The trial judge aborted the trial. This Court ruled that mistrial is necessitated when "an error on the part of the State in the framing of the indictment is committed. Only when the indictment is

defective – . . . when the State has failed to properly execute its responsibilities to frame a proper indictment – does the State's procedural framework necessitate mistrial".

Prosecutors have argued that indictments were void in *Benton* v. *Maryland*, 395 U.S. 784 (1969) and in *Ball* v. *United States*, 163 U.S. 662 (1896). In these cases, a jury trial resulted in acquittal. In an attempt to avoid a Double Jeopardy argument, the prosecutor argued post-trial that the indictment had been defective due to a missing element so as to deprive the district court of jurisdiction. In a situation of role reversal, the accused was in opposition. The Court did not rule the missing-element indictment to be void but voidable at the option of the accused. The constitutional rule established in *Benton* and *Ball* should govern:

> . . . the indictment would seem only voidable at the defendant's option, not absolutely void . . . the indictment was fatally defective . . . (but) its judgment is not void, but only voidable.
>
> (*Benton*, 395 U.S. at 797).

In addition to the Ninth Circuit, other circuits have likewise routinely ruled that the proper remedy for a fatal indictment was dismissal of that indictment even after guilty verdict by a petit jury. Examples include: *United States* v. *King*, 587 F.2d 956 (9th Cir. 1978); *United States* v. *Huff*, 512 F.2d 66 (5th Cir. 1975); *Nelson* v. *United States*, 406 F.2d 1136 (10th Cir. 1969). Neither party has been able to locate any authority to support the government argument that the strength of the government case at jury trial can validate an invalid indictment which was

ruled to be "fatally defective" on appeal, or otherwise, after timely and proper pretrial application for dismissal.

A decision heavily relied upon by the Solicitor is *United States* v. *Mechanik*, 475 U.S. 66 (1986). However, the Court did not rule that defendant Mechanik had proceeded to trial based on a constitutionally deficient indictment. The Court's reasoning, in part, was that despite the diligence of the defense, the attack on the validity of the indictment was not timely. The Court commented that had "the matter been called to its attention before the commencement of the trial" dismissal would have been justified. (Id. 69). Contrary to the present case, this Court noted that the first indictment "was concededly free from any claim of error". A subsequent indictment "was materially unchanged from the valid initial indictment". (Id. 66, 69). Had defendant Mechanik obtained a ruling that his indictments were fatally flawed, and therefore that the indictment had ceased to be an indictment, then the Court's decision as to the appropriate remedy in that case would also serve as precedent in this case.

*Mechanik* is also unavailing because that decision concerns the same question of fact before the petit jury as presented before the grand jury, namely, the issue of factual guilt. The only distinction between successive considerations of the same factual issue was the standard of proof – "probable cause" versus "reasonable doubt". The determination of whether an indictment is fatally defective is made by a district judge who reviews nothing more than the four corners of the indictment in the light of relevant legal opinions. That determination is a matter of law and not a matter of fact. So, the nature of the issue here is completely different from *Mechanik*. See, for

instance, *United States* v. *Sampson*, 371 U.S. 75, 78-79 (1962) (at the pretrial stage the indictment must be tested by its legal sufficiency to charge an offense without consideration of the evidence). Also, in *United States* v. *Cook*, 17 Wall. 174 (1872) this Court ruled that the question whether every ingredient is accurately alleged is a question of law to be decided by the court, not the prosecutor. Rule 12 likewise lists determination of the validity of an indictment as an issue "the court can determine without a trial of the general issue".

Categorization of questions regarding the sufficiency of the indictment as matters of law is established in the Federal Rules of Criminal Procedure. Rule 12(b)(3)(B) specifically authorizes a pretrial motion to the court "alleging a defect in the indictment . . . that the indictment . . . fails to . . . state an offense". If not raised by the deadline for pretrial motions, an allegation that an indictment is defective is waived under Rule 12(e). But, an exception is a claim that an indictment "fails to invoke the court's jurisdiction or to state an offense". It can be made "at any time while the case is pending". Here, the Solicitor concedes compliance with Rule 12.

Rule 34(a) similarly places the decision regarding the sufficiency of the indictment in the hands of the district judge who must determine "if the indictment does not charge an offense". *Mechanik* concerned only factual guilt – not a question of law.

In *Neder* v. *United States*, 527 U.S. 1 (1999), as well as its predecessor *Johnson* v. *United States*, 520 U.S. 461 (1997), the subject matter concerned jury instructions. There was no issue concerning the indictment. The indictment was unchallenged. At no point did the charging

document cease to be an indictment. Unlike the present case, neither the Bill of Rights, nor any other provision in the Constitution, addresses the subject of jury instructions. The Constitution provides no explicit remedy for incorrect jury instructions. In contrast, the Grand Jury Clause provides the exclusive means of initiating a federal prosecution coupled with appropriate remedy that "he shall not be held to answer" if the indictment is constitutionally deficient. The Grand Jury Clause is interlinked with the "Notice and Cause" Clause in the Sixth Amendment and also with the Double Jeopardy Clause in that it provides a means for distinguishing successive prosecutions. *United States* v. *Debrow*, 346 U.S. 374 (1953). In view of its three constitutional functions, the Founders established the grand jury as the sole means of initiating a prosecution by the government. Rule 7(c)(1) embodies the constitutional requirement that the charge provide "essential facts". Rule 30 governs jury instructions and just states in a general way "that the court instruct the jury on the law". Hence, the constitutional status of a grand jury indictment, including the remedy provided, is far more significant than mundane jury instructions. The question whether a defective indictment is a "structural" error is addressed in Argument II.

Similarly, in *United States* v. *Cotton*, 535 U.S. 625 (2002) the merits trial was based on a "valid on its face" indictment. The accused "did not object in the district court" but instead "argued in the Court Of Appeals". (Id. 627, 628). The Court noted that the result might have been different had "proper objection been made in the district court". (Id. 631). But, the claim was forfeited and so was reviewed under the plain error provisions of Rule 52(b). The Court ruled: "a constitutional right may be

forfeited . . . by the failure to make timely assertion of the right". (Id. 631).

*Cotton* is also distinguished in that it concerned the sentencing element of drug quantity. Absent that element, the indictment nonetheless stated an offense and did not give rise to the right not to be tried.

The *Cotton* court distinguished *Stirone* and *Russell* by noting that "in each of these cases proper objection had been made in the district court to the sufficiency of the indictment . . . (which is) a settled proposition of law". (Id. 631). That ruling in *Cotton* is compatible with this Court's precedents that a defective indictment is "not void, but only voidable". *Benton*, *Ball*, supra. Defendant Cotton's objection involved the quantity of illegal drugs being transacted which is a matter of fact. Defendant Cotton, moreover, had no constitutional right to be indicted on any particular quantity of drugs. Respondent here does have a constitutional right not to be held to answer based on an indictment that is no longer an indictment. Amendment V.

The discussion in *Cotton* regarding subject matter jurisdiction ("the court's statutory or constitutional *power* to adjudicate the case") in no way implies that if a person asserts his constitutional rights in a proper way at the proper time that those rights should be denied to him.

The rule of constitutional law to be assembled from the foregoing precedents is that a defective indictment is voidable nunc pro tunc at the timely option of the accused but is not void, as articulated in *Benton* and *Ball*. In each precedent, post-verdict dismissal of the indictment had the effect of vacating the jury verdict of guilt. When a court at any level rules that an indictment should be dismissed, or that it should have been dismissed previously, at that

point the indictment "is no longer an indictment" within the meaning of *Midland Asphalt*, supra. When an indictment is no longer an indictment, the constitution requires that the accused should not be "held to answer".

In a sense, the damage is not remediable since a court cannot turn back the clock. But, neither does imposition of a sentence in a federal prison sentence accomplish that objective. The only possible remedy on review after verdict is to do what the district judge should have done in pretrial proceedings. Namely, dismiss the indictment which requires that the judgment be vacated. The alternative would be to uphold the judgment, and corresponding prison sentence, based on an indictment that no longer is an indictment.

Respondent now briefly addresses the underlying question of under what circumstances a defect is "so fundamental that it causes . . . the indictment no longer to be an indictment". (*Midland Asphalt*, supra, at 802). Admittedly, not every defect causes an indictment to be constitutionally deficient. In *United States* v. *Debrow*, 346 U.S. 374 (1953) the Court ruled:

> The true test of the sufficiency of an indictment is . . . whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, . . . whether the record shows with accuracy to what extent he may plead a former conviction or acquittal.
>
> (346 U.S. at 376).

This Court has never wavered from the requirement that "elements must be charged in the indictment". *Jones*

v. *United States*, 526 U.S. 227, 232 (1999); *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998). This Court has stated in *United States* v. *Hamling*, 418 U.S. 87, 117 (1974) that: "the language of the statute must be accompanied by such statement of facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged". The same in *United States* v. *Russell*, 369 U.S. 749 (1962) and *United States* v. *Miller*, 471 U.S. 130, 136 (1985): the Fifth Amendment is satisfied "as long as the crime and the elements of the offense that sustain the conviction are fully and clearly set out in the indictment". As far back as *Cochran* v. *United States*, 157 U.S. 286, 290 (1906) this Court declared: "the true test is . . . whether it contains every element of the offense to be charged". These parameters are so well established as to be incorporated in 1948 in Rule 7(c)(1) requiring the indictment to contain: "a plain, concise and definite written statement of the essential facts constituting the offense charged".

This Court has determined that certain values and remedies have per se importance independent of any possible "prejudice" to the accused. Recently, in *United States* v. *Gonzales-Lopez*, 548 U.S. ___, 126 S.Ct. 2557, 2562 (2006), the Court ruled that the constitutional right to counsel of choice is an important value which is not part of "the vehicle for determination of guilt or innocence". The Court ruled: "the right at stake here is the right to counsel of choice, not the right to a fair trial". The right at stake in the present case is the Fifth Amendment right not to be tried on a fatally defective indictment regardless of the strength of the government's case.

Another recent example is *United States* v. *Zedner*, 548 U.S. ___, 126 S.Ct. 1976 (2006) where the Court held

that harmless error analysis was inappropriate due to the "absolute language" and the "categorical terms" of the Speedy Trial Act. After observing that the harmless error doctrine presumptively applies to "*all* errors where a proper objection is made", citing *Neder* v. *United States*, supra, the Court ruled that harmless error review "would undermine the detailed requirements of the provision" of the Act and would be inconsistent with the strategy of Congress. Here, as in *Zedner*, "such an approach would almost always lead to a finding of harmless error because the simple failure to make a record of the sort is unlikely to affect the defendant's rights". (Id. 1990). That is so because if acquittal results, the case terminates. If conviction results, the standard at trial is always reasonable doubt while the standard at grand jury is always probable cause. The harmless error doctrine must be capable of being "square with the Act's categorical terms" and must not "undermine the detailed requirements of the (regulating) provisions". (126 S.Ct. at 1990). Here, the subject matter is not an Act of Congress but is the Constitution itself.

Since the Fifth Amendment itself provides the particular remedy that "no person shall be held to answer", a "fatally flawed" indictment is no indictment at all. The only possible remedy is dismissal of the faulty indictment. After the indictment is dismissed, the judgment and sentence cannot stand. Automatic reversal is the only viable option. The foregoing precedents span 124 years and squarely support respondent's interpretation.

THEREFORE, when an indictment is declared to be fatally defective it is no longer an indictment and the Fifth Amendment right-not-to be-tried is activated independent of the merits.

## II. THE ERROR IN THE PRESENT CASE CANNOT BE CLASSIFIED AS "TRIAL ERROR" BECAUSE IT IS NOT REVIEWABLE AND IS A MATTER OF LAW THAT DID NOT OCCUR DURING THE TRIAL.

This Court ruled in *Arizona* v. *Fulminante*, 499 U.S. 279 (1991) that admission in evidence of a coerced confession was "trial error" because it occurred as a single part of a reviewable record. The significance of the error could be compared against other evidence and other events at trial. This Court summarized the types of errors that would fall in that classification:

> The common thread connecting these cases is that each involved "trial error" -- error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether the admission was harmless beyond a reasonable doubt.

(499 U.S. at 307).

Recently, in *United States* v. *Gonzales-Lopez*, 548 U.S. ___, 126 S.Ct. 2557 (2006), four dissenting justices added that *Fulminante* "did not suggest that trial errors are the *only* sorts of errors amenable to harmless-error review, or that *all* errors affecting the framework within which the trial proceeds are structural". (Internal quotes omitted). The *Gonzales* majority agreed and indicated that the basis of its conclusion that wrongful denial of counsel of choice is "structural" was "the difficulty of assessing the effect of the error". (126 S.Ct. at 2564, n.4).

The first reason the error in the present case is unreviewable is that the government has never identified what discrete act it has selected as the "overt act". The indictment itself does not present the "essential facts" required by Rule 7(c)(1). The indictment does not even mention the element in its generic form. The Solicitor responds that notice can in certain circumstances be given by means other than the indictment. But, the unchallenged decision of the Court of Appeals is that: "Resendiz was never given notice of what specific overt act would be proved at trial". *United States* v. *Resendiz-Ponce*, 425 F.3d 729, 733 (9th Cir. 2005). At best, the record shows only a list of possibilities. An action which is never identified in any form cannot be reviewed against the backdrop of the entire case.

Apart from the indictment, the designation of the overt act was both varied and misleading. When challenged in pretrial proceedings, the government's written response claimed: "the overt act of an attempted entry crime is the entry itself". (JA 15). At oral argument before the trial judge the government modulated: "Miss Logan: . . . the actual attempt to enter is the overt act itself in these cases". (JA 20). At oral argument in the Court of Appeals, the government's identification of the overt act could be construed in two different ways. Both interpretations were rejected on legal grounds. (425 F.3d at 732). A partial list of possible overt acts might include: the physical crossing of the border, the tendering of the bogus identification card, his claim to legal residence, presentation of his cousin's immigration documents to border agents, as well as innumerable other acts. The record created at the jury trial contains no indication of what a grand jury might have selected as the "specific act" which

might constitute an overt act. No court can evaluate the significance of an act which has never been identified.

A second reason that the error is unreviewable is that the transcript of grand jury proceedings was never presented to the district judge as in *Mechanik*. There, the district judge had ordered Jencks Act disclosure of the transcript and thus had a basis to determine that the effect of the Rule 6 error was "negligible" as compared to the strength of the evidence at trial. The rules allow disclosure of grand jury proceedings at government option "preliminarily to or in connection with a judicial proceeding". Rule 6(d)(3)(E)(i). In *United States* v. *James*, 980 F.2d 1314, 1319 (9th Cir.1992) the government did just that. It supplied a copy of the grand jury proceedings so that the district judge could determine it was "inconceivable that James would have presented a different defense if the indictment had been corrected". Here, the government has provided no explanation as to why its grand jury proceedings were "irrational" or "not properly instructed", or how or why a material element was omitted. An evaluation of "harmlessness" must be based on the entire case and not simply on the evidence at the merits trial. *United States* v. *Zedner*, 548 U.S. ___, 126 S.Ct. 1976 (2006); *United States* v. *Vonn*, 535 U.S. 55, 76 (2002) (remanded because harmless error could not be reviewed without transcripts).

The third reason the error cannot be compared to the evidence at trial is that the error is a question of law and not a question of fact. The error in this case occurred when the district judge ruled as a matter of law denying the motion to dismiss "with respect to identifying something as an overt act per se". (JA 26). The trial judge misread the En Banc decision in *United States* v. *Gracidias-Ulibarry*,

231 F.3d 1188 (9th Cir. 2000). That decision had plainly ruled that Congress intended to incorporate the common law meaning of "attempt" into the attempt prong of 8 U.S.C. § 1326 even though the statute does not so state in explicit terms. Moreover, the case of *United States* v. *Pernillo-Fuentes*, 252 F.3d 1030 (9th Cir. 2001) had ordered automatic reversal and applied *Gracidias* when it ruled "the indictment failed to allege the specific intent required in an 'attempt' crime" and ordered automatic reversal based on circuit case law. (252 F.3d at 1032). It was a reasonably obvious conclusion that the government would suffer the same fate in this case.

The error of the district judge is the type of error that is not correctable by a petit jury. A petit jury does not determine whether the common law elements of attempt were incorporated in the attempt prong of Section 1326. It does not review the question whether the indictment adequately reflects prior circuit court decisions. Juries do not visit the law library. The question whether this indictment contains the required "essential facts" of the offense is radically different from questions whether a defendant was involved in a drug conspiracy (*Mechanik*), whether $5,000,000 of undeclared income is material to tax evasion (*Neder*), and whether a quantity of drugs is more or less than 50 grams (*Cotton*). Those were all matters of fact. This distinction was observed in *United States* v. *Fabrizio*, 385 U.S. 263, 270 (1966) ("insufficiency of indictment does not concern factual proof to be raised at a trial on the merits"). See also Rule 12(b)(2) which characterizes a defect in an indictment as a matter that can be determined "without a trial of the general issue". And which "must be raised before trial". Rule 12(b)(3).

The Solicitor argues that the appropriate test for harmlessness should be whether a "rational" grand jury would have found probable cause based on the evidence produced at trial on the merits. Since the district judge is most familiar with the evidence at trial, such determination would be made in the first instance by the same district judge who erroneously ordered the trial to proceed based on an indictment that he should have dismissed. Under the Solicitor's proposal, the evidence presented at trial would determine the charge rather than the charge determine the evidence to be presented. Such an inversion of the constitutional plan would simply conform the charge to whatever evidence happened to have been presented. As Justice Stewart said in *United States* v. *Fabrizio*, 385 U.S. 263, 275 (1966) ("we long ago rejected the notion that it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes").

This court's precedents have uniformly prohibited the government from attacking its own indictment. As stated in *Ball* v. *United States*, supra, the Court will not allow the prosecutor "to tell the court that his own indictment was good for nothing" and thus seek to profit from his own error. (163 U.S. at 1194). As the *Ball* Court phrased it: "Although the indictment was fatally defective, yet, if the court had jurisdiction of the case and of the party, its judgment is not void, but only voidable". Also, *Benton*, supra. In short, the court should not allow the government to attack its own indictment as being the result of an irrational grand jury and then ask the court for a bailout.

Regarding the government argument that the focus should be on a hypothetical "properly instructed" grand jury, respondent points out that both *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) as well as *Neder* v. *United States*, supra, involved instructions not given. In *Sullivan* the Court refused to engage in speculation outside of the record as to whether "a jury *would surely have found* petitioner guilty beyond a reasonable doubt" if properly instructed. In *Neder*, there was no need to go outside the record and there was no uncertainty or guesswork. Here, the facts established at jury trial provide no indication as to what discrete act a grand jury might have selected had it been properly instructed. And, the facts at trial do not lead to any clear indication as to the alien's response as to whether such act was "in furtherance" of the attempt. The trial judge's refusal to give a requested instruction requiring jury unanimity in determining which act was the overt act means that individual jurors may well have had different acts in their minds. (T.6/2/03, p. 178). The same principal was articulated in *United States* v. *Gonzales-Lopez*, 548 U.S. ___, 126 S.Ct. 2557 (2006) where the actions that would have been taken by wrongfully rejected counsel of choice "would be a speculative inquiry into what might have occurred in an alternate universe". (Id. 2565). Parenthetically, one must surely wonder why it would be that the government would instruct its grand jury better the second time around than it did the first time.

The Court should now consider the "societal interest" in holding a person to answer where a grand jury was unable, or perhaps unwilling, to identify a particular element of a crime. The "societal interest" in balancing the rights of the accused against the interests of society was a key factor in *Mechanik*, in *Neder*, and in *Cotton*. If

probable cause cannot be established as to an essential element, the most probable result will be acquittal at trial. The converse of *Mechanik* is that if the prosecutor cannot establish guilt under the probable cause standard, the odds are small that guilt could be established under the reasonable doubt standard.

Few citizens would feel secure in their liberty if the government were free to arrest and detain them solely on the possibility that future investigation would uncover incriminating evidence for use at a merits trial many months later. The Grand Jury Clause assures both citizen and aliens alike that there will be no arrest at least until the government investigation has progressed to the point of being able to establish probable cause. As stated in *Ex Parte Bain*, 121 U.S. 1 (1886), the intent of the Founders was to protect citizens from "the trouble, expense, and anxiety of a public trial before a probable cause is established". (121 U.S. at 12).

The timing of a defense objection is most important because prior to placing the accused in jeopardy the government has numerous options. After jeopardy attaches the options are more limited. Prior to jeopardy, the government may simply dismiss the indictment pursuant to Rule 48 and return to the grand jury to seek a new indictment. *Ex Parte United States*, 287 U.S. 241 (1932). Another option is to supersede the charge without dismissal. Although procedures for a Superseding Indictment are not explicit in the procedural rules, such is a common practice.

If dismissal is granted at the pretrial stage based on a defect in the indictment, the defendant does not necessarily go free. There is no windfall because the court may set

conditions of release or may continue to detain a defendant for a specified time until a new indictment is filed. Rule 12(g). The government is also favored with specific relief from the bar imposed by a statute of limitations if a defective indictment is dismissed either prior to or after expiration. 18 U.S.C. § 3288, § 3289. Similarly, the government has the benefit of an extended Speed Trial Act clock under 18 U.S.C. § 3161(d) if dismissal occurs as a result of a defense motion.

If the objected-to error is merely of a clerical nature, it may be corrected on motion pursuant to Rule 36 "at any time" assuming it is "arising from oversight or omission". In *United States* v. *Rojas-Contreras*, 474 U.S. 231, 231, n.2 (1985) the Court footnoted that a minor change in the indictment could have been accomplished by motion for amendment in the District Court. That error was nothing more than changing the date of the alleged prior deportation from "December 17" to "December 7". In other words, when an error is called to the prosecutor's attention in the early pretrial stages, it is easily corrected. The question that must be asked is "why not get it right the first time"?

In 1872 Congress departed from English common law to avoid "rules of technical and formalized pleadings". (17 Stat. 198, 18 U.S.C. § 556 (1940 Version)). The 1872 statute stated that no indictment should be found to be insufficient "by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant". The legislation was repealed in 1948 and its substance transferred to the modern version of Rule 52(a). (History found in *Russell* at 761). The absence of a material element is if far from "a matter of form only".

Finally, designation of an error as "structural" refers to the framework under which the entire trial proceeds. The charge as stated in the indictment pervades the entire trial. It never changes throughout the trial. Any addition to the indictment would be a constructive amendment which itself is "reversible per se". 24 *James Wm. Moore, Moore's Federal Practice*, § 607 06(1) (3d ed. 2006). It is the indictment that determines the elements that must be proven at trial beyond a reasonable doubt and which determines what the jury instructions must contain. Here, it is pure speculation to guess which act the grand jury might have selected as the overt act. Different grand juries might select different specific acts.

If the district judge had correctly ruled that this indictment contained a "fatal flaw" (*Resendiz-Ponce* at 732), in all probability the government would have returned to the grand jury to correct the indictment by identifying which of the various possible discrete acts constituted its selection as the necessary overt act for the offense of attempted reentry. Double Jeopardy does not bar the government from returning to a successive grand jury. *United States* v. *Williams*, 504 U.S. 1735 (1992). If the overt act were thusly identified, the respondent alien could then have presented possible defenses that the act was not in furtherance of his desire to reenter or, possibly, that he had abandoned his attempt upon immediate discovery by the primary inspector at the border.

THEREFORE, the effect of the error in this matter cannot be ascertained and so cannot be classified as reviewable "trial error".

## III. MISINFORMATION PROVIDED BY THE GOVERNMENT AS TO THE OVERT ACT BEING ALLEGED RESULTED IN AN UNFAIR TRIAL AND "PREJUDICE".

As previously stated, the government has not clearly identified any discrete act that would be the alleged necessary overt act. As the Court of Appeals ruled: "A grand jury never passed on a specific act, and Resendiz was never given notice of what specific act would be proved at trial". *United States* v. *Resendiz-Ponce*, 425 F.3d 729, 733 (9th Cir. 2005). Where an accused is not provided with the "notice and cause" of the accusation, prejudice is inherent. If not inherent, prejudice is most probable.

In the recent case of *Washington* v. *Recuenco*, 548 U.S. ___, 126 S.Ct. 2546 (2006), the information charging Recuenco did not allege a firearm enhancement. Recuenco objected to the lack of notice. Two members of the Court, in dissent, ruled that being convicted of a crime not charged is incompatible with the Fifth and Sixth Amendment. Justice Stevens specifically ruled, in dissent, that: "*Blakely* errors are structural because they deprive criminal defendants of sufficient notice regarding the charges they must defend against". (126 S.Ct. at 2554). But, under *Recuenco*, "elements and sentencing factors must be treated the same for Sixth Amendment purposes". (Id. 2552). The majority did not address the charging error issue. (Id. 2552, n.3). Even if not structural in all situations, the absence of the notice required in an indictment should be strong indication of "prejudice".

Assuming that notice can be provided by means other than the indictment, there was no "other means" in this case. As previously stated in Argument II, the government's responses to the pretrial dismissal motion were

ambiguous. In its opening statement the government summarized what each of its witnesses would state regarding numerous acts by the defendant. But, it did not designate any specific act so as to provide notice. (T.6/1/03, pp. 87-89). If one of these various acts had been identified, Resendiz would have had the opportunity to testify as to whether or not the chosen act was in furtherance of his plan to illegally renter. He might have testified that he physically crossed the line for the purpose of asking whether he could use his cousin's documents for his own entry. He might have testified that having been immediately detected as a phony, he lied to the agent for the purpose of extricating himself from a bad situation. Resendiz' response to a specific government allegation "would be a speculative inquiry unto what might have occurred in an alternate universe". *United States* v. *Gonzales-Lopez*, 548 U.S. ___, 126 S.Ct. 2557 (2006).

At the close of the government's evidence, respondent moved for Rule 29 acquittal. It was only then, when the trial was over, that the prosecutor (Ms. Logan) revealed: "he crossed the boundary and walked to the port of entry in San Luis, which is property of the United States. That is the overt act which is a substantial step toward entering the United States". (T.6/2/03, p. 170). The unchallenged ruling of the Court of Appeals was that as a matter of law the government position "is a non-starter" since "The overt act with which the defendant is charged obviously cannot be identified with the ultimate legal question of guilt or innocence". (425 F.3d at 732). If the reentry had clearly been charged as the overt act in the indictment, the defendant's acquittal motion should have been granted. And, on retrial, he will not be able to reference the first

indictment as a Double Jeopardy bar to a second indictment. That is "prejudice".

Another form of prejudice resulted in a verdict that quite possibly was not unanimous. After close of the evidence respondent requested a unanimity instruction. His lawyer argued: "one of them could decide one thing is an overt act, another could decide another thing is an overt act. They'd all vote to convict even though they don't agree on which it is". (T.6/2/03, p. 178). Thus, the indictment's failure to focus on a specific act denied respondent the right to a unanimous jury verdict.

Even at this late date, the government still has not provided information as to what discrete act this Court should consider as having been the overt act that resulted in conviction. Granted that respondent did "something". There is no assurance that the "something" was in furtherance of the intended attempt to illegally reenter. If the overt act was, for instance, "lying to an inspection officer" respondent may have been attempting to extricate himself because he instantly aroused suspicion and was being referred to secondary inspection. If the overt act was "tendering of the bogus identification card" respondent may have explained that the documents were valid and he wished to inquire if they could be used for his entry. On the other hand, there are "a number of other acts that the government might have alleged as a substantial step toward entry into the United States". (*Resendiz* at 733).

THEREFORE, respondent suffered actual prejudice as a result of the constitutionally deficient indictment.

## CONCLUSION

In conclusion, the Court of Appeals should be affirmed and this court should rule that:

1. Procedural Rule 52(a) cannot validate a constitutionally deficient indictment over the Fifth Amendment personal guarantee that "no person shall be held to answer".

2. The error in the present case cannot be classified as "trial error" because it is not reviewable and is a matter of law that did not occur during the trial.

3. Misinformation provided by the government as to the overt act being alleged resulted in an unfair trial and "prejudice".

Respectfully submitted,

ATMORE BAGGOT, ESQ.
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AUGUST 2006

**8 U.S.C.A. § 1326. Reentry of removed aliens**

(a) In general Subject to subsection (b) of this section, any alien who –

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection –

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the

alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V of this chapter, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.[FN1] or

**(4)** who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

* * *

FOR ARGUMENT.

(13)

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No. 05-998

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

JUAN RESENDIZ-PONCE

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## SUPPLEMENTAL REPLY BRIEF FOR THE UNITED STATES

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**SUPPLEMENTAL REPLY BRIEF FOR THE UNITED STATES**

In his supplemental brief, respondent does not contend that the indictment in this case was deficient because it did not allege, in so many words, that respondent took a "substantial step" toward unlawful reentry. Instead, he contends only that the indictment provided insufficient notice because it failed to *specify* what step (or steps) respondent had taken. That contention lacks merit, because the indictment set forth the charged offense with reasonable factual particularity, which is all the notice that the Constitution requires. Respondent's remaining contention—that the offense of attempted unlawful reentry requires "specific intent"—is irrelevant to the disposition of this case. As respondent acknowledges, respondent has forfeited any claim that the indictment was deficient because it failed expressly to allege that respondent acted with "specific intent." In any event, the offense of attempted unlawful reentry

requires a showing only that the defendant had the intent to reenter the country, not that the defendant also had knowledge that he lacked the consent of the Attorney General (or the Secretary of the Department of Homeland Security). The decision of the court of appeals should be reversed either on the ground that the indictment was constitutionally valid or on the ground that, even assuming that the indictment was invalid, any error was harmless.

1. As the government's supplemental brief explained (at 2-11), the indictment in this case satisfied the Grand Jury Clause's requirement that an indictment charge every element of a criminal offense. To meet that requirement, it was sufficient that the indictment alleged that respondent "attempted" to reenter the country unlawfully, without specifically alleging that respondent took a "substantial step" toward completion of the offense of unlawful reentry. As this Court has repeatedly recognized, it is ordinarily sufficient if an indictment "set[s] forth the offense in the words of the statute itself." *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). Because "attempt" is a term of art with a "definite * * * meaning" in federal criminal law, *id.* at 118-119—including that the defendant took a substantial step toward completion of the corresponding substantive offense, see Model Penal Code § 5.01(1)(c) (1962)—the indictment for an attempt offense need not recite that the defendant took such a "substantial step" in order to comply with the Grand Jury Clause.

Respondent contends only that "use of the term 'attempt' in a [federal criminal] statute necessarily requires a showing of a substantial step." Supp. Br. 4-5. That is undoubtedly true, as reflected by the numerous cases so defining "attempt" in the context of various

federal attempt offenses. See U.S. Supp. Br. 6-7 n.5. But it does not follow—nor does respondent contend—that an indictment that fails to allege, in so many words, that defendant took a "substantial step" toward completion of the corresponding substantive offense is necessarily invalid. Indeed, respondent freely concedes that "attempt" has "a well-established common law meaning," Supp. Br. 13—or, at a minimum, that "attempt" has a settled modern meaning, as reflected in the Model Penal Code's definition of the term, see *id.* at 14-15. Because Section 1326's text prohibits an "attempt" to reenter the country unlawfully, and because it is well established that a federal "attempt" offense requires a substantial step toward the completion of the offense, the indictment in this case sufficiently charged the conduct element of the offense by alleging that respondent "attempted" to reenter the country unlawfully.[1]

2. As the government's supplemental brief explained (at 11-23), the indictment in this case also satisfied the constitutional requirement (rooted primarily in the Sixth Amendment but also in the Grand Jury Clause) that the defendant be provided with sufficient factual detail concerning the charge against him so as to enable him to prepare his defense. An indictment need only set forth the alleged crime "with reasonable particularity of

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[1] Respondent contends that the government has "waived any argument that a section 1326 attempt does not require a substantial step." Supp. Br. 12. The government, however, has never disputed that an "attempt" under 8 U.S.C. 1326(a) requires a substantial step toward completion of the offense of unlawful reentry. Instead, the government has consistently maintained that the *indictment* sufficiently alleged the conduct element of the offense by alleging that respondent had "attempted" to reenter unlawfully. See, *e.g.*, Gov't C.A. Br. 10-11 (court of appeals); J.A. 13-14 (district court).

time, place, and circumstances." *United States* v. *Hess*, 124 U.S. 483, 488 (1888) (quoting *United States* v. *Cruikshank*, 92 U.S. 542, 558 (1876)). The indictment in this case identified the date and place of the attempted unlawful reentry, and those factual details were sufficient to enable respondent to prepare his defense. This Court has rejected the argument that an indictment must specify the "particular means" by which a crime has been committed, see *United States* v. *Simmons*, 96 U.S. 360, 364 (1878), and lower courts have routinely rejected the precise argument that an indictment for a federal attempt offense must allege the acts or means by which the defendant attempted to commit the corresponding substantive offense, see U.S. Supp. Br. 15-18 (citing cases). The indictment therefore provided respondent with sufficient factual detail concerning the charge against him.

Respondent contends that this Court's decision in *Russell* v. *United States*, 369 U.S. 749 (1962), requires that an indictment must "descend to particulars." Supp. Br. 2 (quoting 369 U.S. at 765). Based on that language, respondent suggests that the Constitution requires an indictment to provide not merely enough factual detail to enable a defendant to prepare his defense, but enough factual detail to allow a reviewing court to verify that the evidence presented at trial was consistent with the evidence presented to the grand jury. See *id.* at 8 (stating that, "even if the constitutionally-mandated apprisal function could be satisfied by the minimal allegations made here, the right to be tried on only the grand jury's actual findings is lost"). That approach, however, cannot be squared with this Court's numerous decisions stating that an indictment can be drawn "in general terms," *Stirone* v. *United States*, 361 U.S. 212, 218 (1960), and

need not include all of the facts that the government intends to prove at trial, see, *e.g.*, *Cochran* v. *United States*, 157 U.S. 286, 290 (1895); *United States* v. *Britton*, 107 U.S. 655, 663 (1883).[2] It is also difficult to reconcile with the rule that a defendant may not challenge the sufficiency of the evidence presented to the grand jury. See, *e.g.*, *Costello* v. *United States*, 350 U.S. 359, 363-364 (1956). This Court's decision in *Russell* did not purport to abrogate or modify the general rule that an indictment need only set forth the alleged crime with reasonable factual particularity. Instead, it held that an indictment must provide additional factual detail concerning an element when such detail is truly necessary to apprise the defendant "of what he must be prepared to meet." See 369 U.S. at 764. For example, an indictment for perjury must not only allege that a defendant testified falsely, but also identify the specific testimony alleged to be false. But *Russell* does not support the sweeping proposition that, regardless of the crime charged, an indictment must allege specific factual detail about every element—let alone respondent's claim that an indictment must allege *all* of the factual particulars that the grand jury may have found in returning it.[3]

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[2] Perhaps recognizing the difficulty with a rule that would require an indictment to lay out all of the facts that a grand jury may have found, respondent asserts (Supp. Br. 6-7) that it would have been sufficient for the indictment in this case to allege that respondent "tender[ed] false identification," without more specifically alleging that respondent "show[ed] a laminated, 2 inch by 3 inch red and white Arizona driver's license in the name of his cousin, which he had obtained three days earlier." Respondent, however, offers no principle to limit how much factual detail is required to satisfy the requirement of "descend[ing] to the particulars."

[3] Respondent contends that "the prosecution must, at a minimum, identify the manner and means by which the defendant violated the

Respondent contends that the indictment in this case "nowhere descends to the particulars of the charged offense." Supp. Br. 7. That contention, however, overlooks the fact that the indictment specified (1) the date of the attempted unlawful reentry ("[o]n or about June 1, 2003") and (2) the place of the attempted unlawful reentry ("at or near San Luis in the District of Arizona"). J.A. 8. Respondent does not deny that those factual details were sufficient to enable him to prepare his defense. Nor could he do so, particularly in light of the reality that (as respondent appears to concede, see Supp. Br. 7) an individual could use only a limited number of means to attempt to effectuate unlawful reentry at the border—particularly where (as here) the individ-

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statute." Supp. Br. 2. The sole authority that respondent cites for that proposition—the Second Circuit's decision in *United States* v. *Stavroulakis*, 952 F.2d 686, cert. denied, 504 U.S. 926 (1992)—does not support it. Although the indictment in question did provide a "brief explanation of how [the defendant] attempted to execute the scheme," *id.* at 693, the Second Circuit, in upholding the indictment against challenge on other grounds, merely reaffirmed the proposition (hardly helpful to respondent) that "an indictment need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime," *ibid.* (citation omitted). The court added that, "[w]hen an indictment delineates the elements of a charged offense, however concisely, the underlying concerns of proper pleading—notice of the charge to be met and protection against double jeopardy—may be further promoted by a bill of particulars or pre-trial discovery." *Ibid.* Although (as respondent notes, see Supp. Br. 2) *Stavroulakis* itself cited Federal Rule of Criminal Procedure 7(c)(1) and a treatise on civil procedure, it did so only for the proposition (also unhelpful to respondent) that "[t]he Federal Rules of Criminal Procedure encourage succinct criminal pleadings." *Stavroulakis*, 952 F.2d at 693; cf. Fed. R. Crim. P. 7(c)(1) (stating that an indictment "may allege that the means by which the defendant committed the offense are *unknown*") (emphasis added).

ual is attempting to reenter at an official port of entry. The indictment in this case therefore provided constitutionally sufficient notice.

Again citing *Russell*, respondent contends that "a bill of particulars cannot save an invalid indictment," Supp. Br. 3 (quoting 369 U.S. at 770), and that a prosecutor cannot "demand that the defense (through discovery and motions) and the courts (through resolution of those motions) extract [factual] specifics" concerning the charged offense, *ibid.* It is true that a bill of particulars and discovery cannot render valid a fatally insufficient indictment. But a bill of particulars, discovery, or other information from the prosecution can defeat a defendant's later claim of prejudice from an indictment that otherwise might provide insufficient notice. This case is a perfect example: respondent has conceded that he received notice of the government's evidence concerning his actions at the border when the government disclosed that evidence in discovery. See Oral Arg. Tr. 34. It is unnecessary in this case, however, to analyze whether respondent suffered prejudice from any deficiency, because the indictment in fact provided sufficient detail to allow respondent to frame his defense.

3. Finally, respondent contends that the offense of attempted unlawful reentry under 8 U.S.C. 1326(a) requires proof of "specific intent": *i.e.*, proof not only that the defendant had the intent to reenter the country, but also that the defendant had knowledge that he lacked the consent of the Attorney General (or the Secretary of the Department of Homeland Security) to reenter. See Supp. Br. 16-25. As respondent concedes (*id.* at 16), however, no question concerning the intent element of the offense of attempted unlawful reentry is presented in this case. Consistent with the Ninth Circuit's decision

in *United States* v. *Gracidas-Ulibarry*, 231 F.3d 1188 (2000) (en banc), the indictment in this case alleged that respondent "*knowingly* and intentionally attempted" to reenter the country unlawfully. J.A. 8 (emphasis added). As respondent also concedes (Supp. Br. 16 n.9), respondent did not claim in the court of appeals that the indictment was deficient because it did not more specifically allege that respondent possessed "specific intent." Nor did respondent clearly advance such a claim in the district court. See J.A. 10 (contending, in motion to dismiss indictment, only that the indictment was defective "because it does not allege or state any facts concerning the overt act necessary for the 'attempt' prong of § 1326"); J.A. 23 (contending, at argument before the district court, that the indictment failed to identify "the facts of the specific intent"). This Court therefore need not consider the degree of intent required for attempted unlawful reentry in determining whether the indictment in this case was valid under the Fifth Amendment.

In any event, attempted unlawful reentry under 8 U.S.C. 1326(a) requires a showing only that the defendant intended to reenter the country, and does not require an additional showing that the defendant had knowledge that he lacked the consent of the Attorney General (or the Secretary of the Department of Homeland Security) to reenter. Nothing in the text of the statute suggests the latter requirement, and it is settled law that the corresponding substantive offense of unlawful reentry requires only an intent to reenter the country. See *United States* v. *Carlos-Colmenares*, 253 F.3d 276, 277 (7th Cir.) (citing cases), cert. denied, 534 U.S. 914 (2001). Respondent asserts (Supp. Br. 5, 17-19) that "specific intent" is implicit in common-law attempt. But respondent fails to establish the insufficiency of a show-

ing of a specific *intent to enter*. A person with that intent who takes a substantial step towards his goal is not committing a "strict liability" crime, as respondent suggests. See Supp. Br. 24. And nothing in the common law or Section 1326(a) indicates that, in order to establish "specific intent," the government is required to prove that a defendant knew that he lacked consent to reenter.[4]

Accordingly, a number of circuits have rejected the argument that the offense of attempted unlawful reentry requires a defendant to know that he lacked consent to reenter. See *United States* v. *Rodriguez*, 416 F.3d 123, 125-128 (2d Cir. 2005), cert. denied, 126 S. Ct. 1142 (2006); *United States* v. *Morales-Palacios*, 369 F.3d 442, 445-448 (5th Cir.), cert. denied, 543 U.S. 825 (2004); *United States* v. *De León*, 270 F.3d 90, 92 (1st Cir. 2001); *United States* v. *Peralt-Reyes*, 131 F.3d 956, 957 (11th Cir. 1997) (per curiam), cert. denied, 523 U.S. 1087 (1998). Even the Ninth Circuit's decision in *Gracidas-*

[4] To the extent that respondent suggests that a defendant need know not only that he *lacked* consent to reenter, but also that he *needed* consent to reenter, such a requirement would amount to a mistake-of-law defense to a Section 1326(a) attempt charge—in contravention of the "general rule" that "ignorance of the law or a mistake of law is no defense to criminal prosecution." *Cheek* v. *United States*, 498 U.S. 192, 199 (1991). In any event, the only persons subject to prosecution under Section 1326(a) are aliens who "ha[ve] been denied admission, excluded, deported, or removed or ha[ve] departed the United States while an order of exclusion, deportation, or removal is outstanding." Those persons can be charged with knowledge of their ineligibility to reenter the United States without official authorization. Cf. *Morales-Palacios*, 369 F.3d at 448 (noting that "a previously deported alien has a unique set of knowledge that might not otherwise exist for defendants in traditional common law crimes; upon being deported, an alien has been given both oral and written notice that he or she cannot reenter without * * * express permission").

*Ulibarry* does not squarely address whether a defendant may avoid liability under Section 1326(a) by showing that he did not know that he lacked consent to reenter the country. The defendant there admitted knowing that he lacked consent; his defense was that he did not have *any* intent to reenter the country, because he was asleep at the time he was driven to a port of entry. See 231 F.3d at 1191, 1197.

In this case, however, the only question properly before the Court is whether the court of appeals correctly applied a rule of automatic reversal after determining that the indictment failed sufficiently to allege the *conduct* element of the offense of attempted unlawful reentry. See Pet. App. 3a-6a. To reverse the decision of the court of appeals, this Court need only conclude either that the indictment was not deficient in the first place, or that, even assuming that the indictment was deficient, any error was harmless because a properly instructed petit jury returned a guilty verdict. Both of those conclusions are warranted; either would justify reversal.

* * * * *

For the foregoing reasons and those stated in the government's opening, reply, and supplemental briefs, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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## REPLY BRIEF FOR THE UNITED STATES

In *Neder* v. *United States*, 527 U.S. 1 (1999), this Court held that the omission of an offense element from the petit jury's instructions does not constitute structural error. That rule—which the Court reaffirmed in *Washington* v. *Recuenco*, 126 S. Ct. 2546 (2006)—compels the conclusion that the omission of an offense element from a federal indictment does not constitute structural error either. Respondent and his amici do not ask this Court to revisit *Neder*, nor do they offer any valid justification for concluding that the failure to submit an offense element to the grand jury would necessitate automatic reversal when the failure to submit an offense element to the petit jury would not. As in *Neder* and *Recuenco*, the error at issue should be subject to harmless-error review.

Respondent's other arguments lack merit. To the extent that respondent suggests that errors at the grand jury stage are not susceptible to harmless-error analysis at all, that suggestion is foreclosed by this Court's pre-

cedents. And to the extent that respondent renews his claim that the indictment in this case did not provide him with sufficient notice to enable him to prepare his defense, that claim also fails, because respondent cannot show that he suffered prejudice from any deficiency in the indictment. Because the petit jury was correctly instructed concerning the omitted element and found that the omitted element had been proved beyond a reasonable doubt, any error was harmless, and the judgment of the court of appeals should be reversed.

### A. The Omission Of An Offense Element From A Federal Indictment Is Analogous To The Omission Of An Offense Element From The Petit Jury's Instructions, Which Is Subject To Harmless-Error Review

This Court recently reaffirmed the principles that "most constitutional errors can be harmless" and that, "[i]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." *Recuenco*, 126 S. Ct. at 2551 (citations omitted). The error at issue in this case is closely analogous to the error in *Neder*, and neither respondent nor his amici offer any principled basis for treating it differently.

1. Respondent correctly notes (Br. 13) that *Neder* itself "concerned jury instructions" and that, in *Neder*, "[t]here was no issue concerning the indictment." The reasoning of *Neder*, however, cannot be confined to instructional errors specifically, or to trial errors more generally. Indeed, in *Recuenco*, the Court held that an error in enhancing a sentence based on a finding by the judge rather than the jury can be harmless on the ground that it was "indistinguishable" from the error in

*Neder*, notwithstanding the fact that the error was fully realized only at sentencing. 126 S. Ct. at 2552.[1] Like the error in *Recuenco*, the error in this case—the failure to submit an offense element to the grand jury—has no better claim to structural error than the failure to submit an element to the petit jury. In fact, the error here is an even weaker candidate for structural error than the error in *Neder*, for reasons that respondent and his amici do not dispute: for example, because the Fifth Amendment right to an indictment by grand jury, unlike the Sixth Amendment right to a trial by a petit jury, has not been incorporated against the States as an essential requirement of fundamental fairness, and because the petit jury provides numerous protections for the accused that the grand jury does not. See U.S. Br. 14-17.

2. Respondent repeatedly suggests (Br. 1-2, 4-5, 13-14) that the error at issue here nevertheless "necessarily renders [the] trial fundamentally unfair," *Rose* v. *Clark*, 478 U.S. 570, 577 (1986), and is thus structural, because the Fifth Amendment provides that "[n]o person shall be held to answer for a [crime] unless on * * * indictment of a Grand Jury." But the Fifth Amendment no more explicitly provides that every element of a criminal offense be charged in an indictment than the Sixth Amendment provides that every element of a criminal offense be submitted to the petit jury. The Fifth

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[1] Amicus NACDL contends that, in *Recuenco*, the Court "recogni[zed] that *Neder* governs constitutional errors 'at trial alone.'" Br. 23 (quoting *Recuenco*, 126 S. Ct. at 2551). The sentence in *Recuenco* from which NACDL quotes, however, does not support that proposition: indeed, the word "alone" does not even modify the word "trial." See 126 S. Ct. at 2551 ("We have repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal.").

Amendment states that "[n]o person shall be held to answer" except by indictment, just as the Sixth Amendment states that, "[i]n all criminal prosecutions, the accused shall enjoy the right to [trial] by an impartial jury." In both cases, the omission of an offense element can violate mandatory constitutional language that appears absolute.[2] But *Neder* made clear that a violation of the Sixth Amendment's mandatory text is not structural. Nothing in the language of the Fifth Amendment elevates the right to indictment by a grand jury over the Bill of Rights' other important guarantees.[3]

3. Relying on a footnote in this Court's recent decision in *United States* v. *Gonzalez-Lopez*, 126 S. Ct. 2557 (2006), respondent contends (Br. 1) that, even if the error at issue does not necessarily render the trial fundamentally unfair, it should be treated as structural because, in this context, "the harmless error inquiry is irrelevant to remedying the constitutional error." In that footnote, however, the Court cited only its decision

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[2] The right to indictment by a grand jury, like the right to trial by a petit jury, can be waived. See Fed. R. Crim. P. 7(b), 23(a).

[3] Quoting this Court's decision in *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 802 (1989), respondent suggests (Br. 5) that the omission of an offense element constitutes "a defect so fundamental that it causes * * * the indictment no longer to be an indictment." In *Midland Asphalt*, however, this Court considered only whether a particular type of indictment defect (an isolated breach of the secrecy requirement) was "so fundamental" that the denial of a motion to dismiss alleging that defect should be immediately appealable. 489 U.S. at 802. The Court rejected that suggestion and in no way indicated that the omission of an offense element constituted such a fundamental defect. It is settled law that the denial of a motion to dismiss an indictment on the ground that it omitted an offense element is not immediately appealable. See, *e.g.*, *United States* v. *Bird*, 359 F.3d 1185, 1188-1189 (9th Cir. 2004).

in *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984), for the proposition that an error may be structural where harmlessness is "irrelevant." *Gonzalez-Lopez*, 126 S. Ct. at 2564 n.4. *McKaskle* is readily distinguishable, because it involved the right to self-representation at trial—a right that implicates values of individual dignity and autonomy wholly distinct from the values of fairness and accuracy implicated by most other procedural rights (including the right to indictment by a grand jury). See *Faretta* v. *California*, 422 U.S. 806, 832-834 (1975).

Denial of the right to self-representation usually *increases* the likelihood that the defendant will obtain a *favorable* outcome at trial, such that it would be nonsensical to apply harmless-error analysis. See *McKaskle*, 465 U.S. at 177 n.8. Nothing similar can be said about the omission of an element from an indictment. Even if the indictment is deficient, the court can still properly instruct the jury, and the defendant can still have adequate notice. In such a case, the indictment error will have *no* effect on the ultimate outcome at trial—and thus can appropriately be treated as harmless.

4. Again relying on this Court's decision in *Gonzalez-Lopez*, respondent argues (Br. 24) that the error at issue should be treated as structural because it would require excessive speculation (and would thus be too difficult) to assess the harmlessness of the error. That argument, however, proves far too much, because it suggests that *any* grand jury error should be treated as structural—in contravention of this Court's decisions in *United States* v. *Mechanik*, 475 U.S. 66 (1986), and *Bank of Nova Scotia* v. *United States*, 487 U.S. 250 (1988), which held that various grand jury errors are susceptible to harmless-error review. Finding that the omission of an element from the indictment is harmless

is no more speculative than finding that the omission of an element from the jury instructions is harmless. A grand jury error would be structural only if a reviewing court would effectively have to perform the *entirety* of the grand jury's function in order to determine whether the error was harmless. See, *e.g.*, *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986); cf. *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993) (administration of defective reasonable-doubt instruction to petit jury).

### B. This Court's Decisions Concerning Grand Jury Errors Support The Conclusion That The Omission Of An Offense Element From A Federal Indictment Is Subject To Harmless-Error Review

Respondent and his amici cannot validly distinguish this Court's decisions applying harmless-error and plain-error analysis to grand jury errors.

1. Respondent contends (Br. 12) that this Court's decision in *Mechanik*, *supra*, is distinguishable on the ground that *Mechanik* concerned "the issue of factual guilt," whereas this case involves "a matter of law and not a matter of fact." That distinction is illusory. It is true that the question whether a federal indictment omits an element of the offense presents a legal question, subject to *de novo* review on appeal. Like the error in *Mechanik*, however, the error at issue does implicate the issue of "factual guilt." A reviewing court can properly ask whether, but for the error, it is clear beyond a reasonable doubt that a rational grand jury would still have concluded that there was probable cause to believe that the accused had committed the charged crime.

Respondent's amici seek to distinguish *Mechanik* and *Bank of Nova Scotia* on the ground that those cases involved non-constitutional errors. NACDL Br. 18-19;

NAFD Br. 22-23. But this Court has often recognized that most constitutional errors can be harmless. See, *e.g.*, *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991); *United States* v. *Lane*, 474 U.S. 438, 446 n.9 (1986). Nothing in *Mechanik* or *Bank of Nova Scotia* suggests a different rule for grand jury errors. While the error at issue is obviously not identical to the errors in *Mechanik* and *Bank of Nova Scotia*, it is analogous in the most important sense: the error does not automatically preclude a fundamentally fair proceeding or wholly vitiate the grand jury's performance of its constitutionally assigned function.

2. Respondent's amici contend that the error at issue is instead comparable to the error in *Vasquez*, *supra*: *i.e.*, purposeful racial discrimination in the selection of the grand jury, which the Court held to be structural. See NACDL Br. 6-7; NAFD Br. 13-14. That comparison lacks merit. In *Vasquez*, "the structural protections of the grand jury [were] so compromised as to render the proceedings fundamentally unfair." *Bank of Nova Scotia*, 487 U.S. at 257; see *Vasquez*, 474 U.S. at 263-264. Although the Court has not held that discrimination in the selection of the grand jury is the *only* type of grand jury error that would qualify as structural, the omission of an offense element from the indictment does not rise to that level. Unlike discrimination in the selection of the grand jury, the omission of an offense element does not systematically infect the grand jury's decisionmaking process, and thus does not constitute the type of error that necessarily results in fundamental unfairness. See U.S. Br. 13-17; pp. 3-4, *supra*.

NAFD relies (Br. 15-18) on the portion of *Vasquez* suggesting that a grand jury need not indict even where there is probable cause to do so (and that it would thus

be impossible to analyze the error in that case for harmlessness). Because that portion of *Vasquez* was not "necessary to [the] result" in that case, however, it should be treated as dictum. *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 67 (1996). The Court's holding in *Vasquez* ultimately rested on its determination that "discrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review." 474 U.S. at 263-264. Were it otherwise, *Vasquez* would be irreconcilable with *Mechanik* and *Bank of Nova Scotia*, because the necessary implication of the view that a grand jury can legitimately choose not to indict notwithstanding the existence of probable cause would be that *no* grand jury errors could be analyzed for harmlessness.[4]

3. This Court's decision in *United States* v. *Cotton*, 535 U.S. 625 (2002), further supports the conclusion that the omission of an offense element can constitute harmless error. As respondent notes (Br. 14-15), *Cotton* involved an unpreserved error, and thus entailed application of the plain-error, rather than the harmless-error, doctrine. But the Court's holding that the error at issue—the omission of a sentence-enhancing fact from an indictment (along with the failure to submit that fact to the petit jury)—did not constitute reversible plain error because any error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings, see 535 U.S. at 632-633, necessarily implies that such an error did not *automatically* affect a defendant's substantial rights—and that the error was therefore not

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[4] In any event, the portion of *Vasquez* on which NAFD relies simply cannot be squared with the history of the grand jury, which refutes the proposition that a grand jury may legitimately choose not to indict even in the face of probable cause. See U.S. Br. 28-33; pp. 14-16, *infra*.

structural. See *Neder*, 527 U.S. at 9 (citing *Johnson* v. *United States*, 520 U.S. 461 (1997)).

Amicus NACDL contends (Br. 15-17) that (1) the error in *Cotton* implicated only the "apprisal" function, and not the "screening" function, of an indictment, and (2) the fact that an error does not seriously affect the fairness, integrity, or public reputation of judicial proceedings, does not necessarily mean that the error is not structural. As to the first point, this Court's recent decision in *Recuenco* makes clear that the omission of a sentence-enhancing fact is functionally equivalent to the omission of an offense element, see 126 S. Ct. at 2552—and thus that, to the extent that the grand jury performs a screening function, that function is equally implicated where a sentence-enhancing fact (as to which probable cause may be lacking) is omitted. As to the second point, this Court did *assume* in *Johnson* that the omission of an offense element from the petit jury's instructions might be structural, but went on to hold that, even if so, it is not reversible plain error when the evidence on the omitted element is overwhelming and uncontested. See 520 U.S. at 469-470. But NACDL fails to cite a single case in which this Court has actually *held* that an error that does not seriously affect the fairness, integrity, or public reputation of judicial proceedings is nevertheless structural. The only case that NACDL does cite, *Davis* v. *United States*, 411 U.S. 233 (1973), is inapposite. In *Davis*, the Court held only that a defendant who had failed to raise a timely claim of racial discrimination in the selection of his grand jury could not pursue that claim for the first time in a motion for postconviction relief under 28 U.S.C. 2255—not that such discrimination would not constitute reversible plain error. 411 U.S. at 245. *Davis*, moreover, was decided

more than a decade before *Vasquez*, in which the Court deemed such discrimination to be structural error.

Respondent invokes (Br. 7) *Ex parte Bain*, 121 U.S. 1 (1887), and several prior cases for the proposition that the omission of an offense element from a federal indictment automatically requires reversal. To the extent that those cases rely on the premise that indictment defects are jurisdictional, however, they are no longer good law after *Cotton*. See 535 U.S. at 630.

### C. Notice Concerns Do Not Mandate Treating Indictment Errors As Structural

Respondent's claim that the indictment failed to provide sufficient notice of the nature of the charge against him likewise does not justify automatic reversal.

1. Contrary to respondent's repeated suggestions (Br. 3, 20, 23), a claim that an indictment is deficient because it fails to allege all of the elements of the offense is conceptually distinct from a claim that the indictment is deficient because it fails to provide sufficient notice of the nature of the charge. Whereas the former claim is rooted only in the Grand Jury Clause of the Fifth Amendment, the latter claim is also based on other constitutional provisions: most notably, the Sixth Amendment, which provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to * * * be informed of the nature and cause of the accusation."[5] Whereas the requirement underlying the former claim is designed to ensure that the grand jury has considered all of the elements of the offense before deciding to indict, the requirement underlying the latter claim is de-

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[5] The Sixth Amendment, unlike the Grand Jury Clause of the Fifth Amendment, applies in federal and state prosecutions alike. See, *e.g.*, *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948).

signed to ensure that the accused is sufficiently apprised of the charge that he can prepare his defense.

2. Respondent and his amici do not dispute that the express notice requirement of the Sixth Amendment is violated only if the defendant can show that he suffered actual prejudice from any deficiency. Instead, they seemingly contend that, in federal prosecutions subject to the Grand Jury Clause, it is not necessary to show prejudice in order to prevail on a claim that the indictment fails to provide sufficient notice. There is no justification, however, for treating notice claims in federal and state prosecutions differently.

In contending that the indictment in this case provided insufficient notice (and that the deficiency in the indictment warrants automatic reversal), respondent and his amici primarily rely on this Court's decisions in *Stirone* v. *United States*, 361 U.S. 212 (1960), and *Russell* v. *United States*, 369 U.S. 749 (1962). Resp. Br. 8-9; NACDL Br. 10-14; NAFD Br. 4-7. As a preliminary matter, both *Stirone* and *Russell* can be distinguished on their facts. In *Stirone*, it is clear that the factual theory advanced in the indictment (*i.e.*, that an extortion violated the Hobbs Act, 18 U.S.C. 1951, by obstructing commerce in sand) affirmatively *conflicted* with a factual theory advanced at trial (*i.e.*, that the alleged extortion obstructed commerce in steel). 361 U.S. at 213-215. And in *Russell*, although the indictment itself merely alleged the disputed element without providing any factual detail (*i.e.*, that the defendants had refused to answer a question that was "pertinent to the question under inquiry" by Congress, in violation of 2 U.S.C. 192), the Court pointedly noted that, with regard to at least one of the defendants, the government had presented a *different* factual theory (or no theory at all) "[a]t every

stage in the ensuing criminal proceeding." 369 U.S. at 768.[6] Where a defendant is led to believe (whether by the indictment or by subsequent representations) that the government will prove an element by a different means from that ultimately used at trial, it is more likely that the defendant will be able to establish prejudice on the ground that he relied on the government's earlier representations in preparing his defense. That situation differs from a situation in which the indictment is merely "drawn in general terms" and thereby does not misrepresent the government's factual theory in advance of trial. *Stirone*, 361 U.S. at 218.

In this case, respondent cannot show that the government ever identified any different "overt acts" from those ultimately proved at trial—*i.e.*, that respondent presented false identification at the border and that respondent made contradictory statements concerning his intended destination.[7] Because the indictment at most

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[6] *Russell* is further distinguishable in that the Court relied heavily on a unique function of an indictment under 2 U.S.C. 192: namely, that it provide enough detail to permit federal courts to decide, as a matter of law and before trial, whether the question put to the witness was "pertinent to the question under inquiry" by Congress. 369 U.S. at 757-759, 772; see *id.* at 756-757. While *Russell* did rely more generally on the inability of later documents (such as a bill of particulars) to cure a defective grand jury indictment, on the ground that it would "deprive the defendant of a basic protection * * * [that] a grand jury was designed to secure," *id.* at 770, *Russell* did not examine *that* issue from the vantage point of harmless-error analysis. Instead, it relied chiefly on notice-related concerns in reversing. *Id.* at 771-772.

[7] As respondent notes (Br. 20), the government did contend before trial that the indictment sufficiently alleged the "overt act" element by simply alleging that respondent had engaged in an "attempt[]" to reenter unlawfully. See J.A. 15. That contention, however, was entirely consistent with the government's evidence at trial, which merely elaborated on how that "attempt" occurred. See J.A. 29-33, 35-37.

failed sufficiently to inform respondent of the factual theory on which the government intended to proceed, and did not affirmatively mislead respondent with regard to that theory, this is not a case in which the government could be said to have constructively amended the indictment and thereby "shift[ed] its theory of criminality." *Russell*, 369 U.S. at 768.

In any event, to the extent that *Stirone* and *Russell* held that automatic reversal is warranted for certain types of deficiencies in notice, the Court arrived at that view before it had generally recognized that constitutional errors are susceptible to harmless-error analysis. See *Chapman* v. *California*, 386 U.S. 18, 22 (1967). Notably, although the Court has repeatedly listed errors that it deems to be "structural," it has never included notice-related errors of the type at issue in *Stirone* and *Russell*. See, *e.g.*, *Gonzalez-Lopez*, 126 S. Ct. at 2564; *Johnson*, 520 U.S. at 468-469; *Fulminante*, 499 U.S. at 309-310. Accordingly, neither *Stirone* nor *Russell* compels the conclusion that all notice-related deficiencies in indictments automatically require reversal.

3. Respondent generically contends (Br. 28-30) that he suffered prejudice from the alleged deficiency in notice here. But respondent fails to identify any particular way in which the failure to specify in the indictment the "overt acts" on which the government relied actually affected the preparation or presentation of his defense.[8]

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[8] At one point, respondent does suggest (Br. 29) that, if the government had identified the "overt acts" on which it intended to rely "[i]n its opening statement," he might have testified that "he physically crossed the line for the purpose of asking whether he could use his cousin's documents for his own entry" and that "he lied to the agent for the purpose of extricating himself from a bad situation." At a minimum, however, respondent does not dispute that the alleged "overt acts" were

Nor could respondent plausibly do so, in light of the fact that the indictment identified the date and place of the attempted unlawful reentry (and thus provided respondent with sufficient factual information with which to prepare his defense in the first place). This case therefore demonstrates why the failure to provide sufficient notice in the indictment does not warrant the extraordinary remedy of automatic reversal.

### D. Historical Evidence Concerning The Role Of The Grand Jury Does Not Suggest That The Omission Of An Offense Element From The Indictment Constitutes Structural Error

Grand juries have occasionally refused to return indictments (just as petit juries have occasionally refused to return guilty verdicts) when there was apparently sufficient evidence to do so. That history, however, no more shows that grand juries may *properly* refuse to indict in the face of probable cause than that petit juries may *properly* engage in nullification. See U.S. Br. 28-33. Respondent's amici draw different conclusions from that history: namely, that it is *legitimate* for a grand jury not to indict in the face of probable cause and that the failure to instruct the grand jury on an offense element should therefore be treated as intrinsically harmful. Amici are mistaken on both counts.

1. NAFD concedes (Br. 21-22), as it must, that grand juries have been instructed that they have a duty to indict upon a finding of probable cause, but contends

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clear by the close of the government's case-in-chief. See J.A. 29-37. At that point, respondent had every opportunity to testify as he now suggests. Instead, the defense rested without presenting respondent or any other witness (or seeking a continuance), see J.A. 47, and merely contended that the evidence was legally insufficient, see J.A. 55-58.

that those instructions should be given little weight because they merely constitute "the views of individual jurists" and conflict with the Framers' conception of the grand jury. NAFD, however, overlooks that such instructions have been delivered since the earliest days of the Republic, dating from an instruction delivered by Chief Justice Jay while the Bill of Rights were in the process of being ratified. See U.S. Br. 31 n.10. And NAFD likewise ignores the fact that the model grand jury charge, approved by the Judicial Conference of the United States, contains such an instruction—which has been upheld against the claim that it improperly forecloses grand juries from engaging in nullification. See *United States* v. *Navarro-Vargas*, 408 F.3d 1184, 1202-1206 (9th Cir.), cert. denied, 126 S. Ct. 736 (2005). Such instructions show that, while grand jury nullification has occasionally occurred even after the adoption of the Constitution, it has never been formally sanctioned.

NAFD more broadly contends (Br. 10-13) that grand juries effectively exercise the same discretion as prosecutors in deciding whether prosecutions should go forward. It is certainly true that grand juries serve as a check on prosecutors, in the sense that they may prevent a prosecution from going forward when the evidence is insufficient (and that they have the *power* to prevent a prosecution from going forward even when the evidence is sufficient). But it would not only depart from the role traditionally assigned to grand juries to conclude that grand juries may *legitimately* choose not to indict notwithstanding the existence of probable cause. It would also raise separation-of-powers concerns to assign grand juries a form of prosecutorial discretion. It is the President in whom "executive Power" is vested and who has the duty to "take Care that the

Laws be faithfully executed." U.S. Const. Art. II, §§ 1, 3. Prosecutorial discretion is a critical incident of the President's authority under the Take Care Clause, see *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996), and is subject to political checks. If a federal prosecutor abuses his power by bringing prosecutions that the public believes are inappropriate, the executive may be held accountable through the political process for poorly exercising its discretion, or Congress can amend the law. Grand juries are neither elected nor accountable to the public; their role is not to second-guess public policy, but to protect against factually unfounded prosecutions. See U.S. Br. 32-33. It would contravene our constitutional structure to allow the grand jury to short-circuit the political process by making judgments about the exercise of prosecutorial discretion or the wisdom of enacted laws.[9]

2. Even assuming that a grand jury may legitimately refuse to indict notwithstanding the existence of probable cause, it does not follow that the failure to instruct the grand jury on an offense element should be treated as intrinsically harmful. Respondent's amici contend that (1) the failure to instruct the grand jury on one element of the crime may impair the grand jury's ability to engage in nullification and (2) that, notwithstanding evidence that petit juries (like grand juries) have sometimes engaged in nullification, grand

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[9] While this Court has noted that the Constitution does not "textually assign[]" the grand jury to any of the three branches, *United States* v. *Williams*, 504 U.S. 36, 47 (1992), it has treated the grand jury's decision to indict as a "substitute" for the decision of a judicial officer with regard to the existence of probable cause, *Gerstein* v. *Pugh*, 420 U.S. 103, 117 n.19 (1975).

jury errors should nevertheless be treated differently. NACDL Br. 22; NAFD Br. 23-24, 26 n.14.

As to the first point, NAFD speculates (Br. 23-24) that, where the evidence concerning the omitted element is weak, a grand jury may have seized on that fact to nullify—but is disabled from doing so when the element is omitted. That speculation, however, seems strained. Indeed, a grand jury may be *more* likely to nullify when an element is omitted, insofar as jurors believe that the remaining elements should not constitute a criminal offense at all. And because a grand jury error will be found harmless only when the evidence at trial proves the omitted element beyond a reasonable doubt, the harmless-error rule at issue will not apply where the evidence is "weak."

As to the second point, respondent's amici do not explain why grand juries and petit juries should be treated differently for purposes of harmless-error analysis. Indeed, to the extent that they differ, petit juries offer *greater* protections for the accused, as NAFD notes. See Br. 26 n.14. That fact counsels in favor of, not against, applying harmless-error review to grand jury errors. See U.S. Br. 16-17; p. 3, *supra*.

**E. The Omission Of The "Overt Act" Element From Respondent's Indictment Was Harmless**

In a case involving a grand jury error, the test for harmless-error analysis is whether it is clear beyond a reasonable doubt that, but for the error, a rational grand jury would still have returned an indictment. Respondent and NACDL do not dispute that proposition, but instead effectively challenge this Court's further holding in *Mechanik* that, where a properly instructed petit jury subsequently finds the defendant

guilty, an error at the grand jury stage should be treated as harmless. The Court, however, should adhere to that holding and apply it here.

1. Respondent notes (Br. 25) that, "if the prosecutor cannot establish guilt under the probable cause standard, the odds are small that guilt could be established under the reasonable doubt standard." What is relevant, however, is that, where the petit jury finds that an offense element has been proved beyond a reasonable doubt, the odds are remarkably high that the grand jury also would have found that there was probable cause to believe that the element had been satisfied. And even in the rare case in which the grand jury would not have found probable cause, it would be pointless to reverse the jury's verdict, because the government would ordinarily be able to reindict and reconvict the defendant on remand based on the evidence presented at trial. Consideration of the petit jury's verdict is therefore appropriate even if that verdict does not *conclusively* establish that the grand jury would have found probable cause as to the omitted element.

2. NACDL offers various policy-based reasons in support of a contrary rule, all of which lack merit. First, NACDL contends (Br. 26) that, unless the error at issue were deemed to be structural, "trial judges would not have an incentive to dismiss constitutionally defective indictments." The ordinary presumption, however, is that judges will follow the law, especially the Constitution, without any need to create "incentives" for them to do so. See, *e.g.*, *Mickens* v. *Taylor*, 535 U.S. 162, 173 (2002). Second, NACDL suggests (Br. 26) that "a petit juror may be influenced by a grand jury's determination of probable cause." To the extent that is true, however, the more sensible solution would be to instruct petit ju-

ries not to consider the issuance of an indictment in determining guilt—not to treat as structural any error that may have affected the grand jury's decision to return an indictment. Third, NACDL asserts (Br. 27) that, "[i]n the event a petit jury * * * declines to convict a defendant at trial, the ramifications [from an indictment] may still be severe." That point is irrelevant when the petit jury *does* convict the defendant—and, in any event, any reputational harm that a defendant suffers simply by virtue of being indicted is not cognizable at law, as reflected by the settled rule that a defendant usually may not take an interlocutory appeal from the denial of a motion to dismiss the indictment (and may not appeal at all if he is subsequently acquitted). See 15B Charles Alan Wright et al., *Federal Practice and Procedure* § 3918.1, at 424 (2d ed. 1992) (Wright).

In this case, because it is undisputed that the petit jury was correctly instructed concerning the offense element at issue, the omission of that element from the indictment is necessarily harmless. The court of appeals thus erred by reversing respondent's conviction.

### F. Rule 34 Does Not Preclude Harmless-Error Review Of The Omission Of An Offense Element From A Federal Indictment

Finally, respondent suggests (Br. 1, 7) that Federal Rule of Criminal Procedure 34, the rule governing motions for arrest of judgment, precludes application of harmless-error review to the omission of an offense element from a federal indictment. In relevant part, Rule 34(a) provides that, "[u]pon the defendant's motion or on its own, the court must arrest judgment if * * * the indictment * * * does not charge an offense." As respondent recognizes (Br. 7), however, "[m]otions for this

relief are rarely made, and it is even rarer that they are granted." 3 Wright § 571, at 615 (3d ed. 2004). The better reading of Rule 34 is that it merely specifies *when* a defendant may object to a deficiency in the indictment before the district court in order to preserve that objection; it does not specify the standard of review that the district court should apply to such an objection. Cf. 4 Wayne R. LaFave et al., *Criminal Procedure* § 19.3(e), at 779 (2d ed. 1999) (noting that, "[i]n considering essential elements objections first raised after conviction, appellate courts are fully aware of the defense incentive to sandbag and they often react accordingly"); *United States* v. *Thompson*, 356 F.2d 216, 226 (2d Cir. 1965) (noting that "the courts of the United States long ago withdrew their hospitality toward technical claims of invalidity of an indictment first raised after trial, absent a clear showing of substantial prejudice to the accused"), cert. denied, 384 U.S. 964 (1966). As respondent acknowledges (Br. 1), Rule 34 must be read *in pari materia* with Rule 52(a), the harmless-error rule, which presumptively applies to "*all* errors where a proper objection is made." *Neder*, 527 U.S. at 7. At a minimum, Rule 34 does not contain the "strong support" necessary to find an implied repeal of Rule 52(a) in this context. *Zedner* v. *United States*, 126 S. Ct. 1976, 1989 (2006); *United States* v. *Vonn*, 535 U.S. 55, 65 (2002).

## CONCLUSION

For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
*Solicitor General*

SEPTEMBER 2006

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No. 05-998

IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA,

*Petitioner,*

v

JUAN RESENDIZ-PONCE,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## THE INDICTMENT IS FATALLY DEFECTIVE FOR FAILURE TO ALLEGE A SUBSTANTIAL STEP AND TO DESCEND TO ITS PARTICULARS

Petitioner concedes that "the Grand Jury Clause requires that every element of a criminal offense be charged in a federal indictment" in order "to ensure that the grand jury has considered all of the elements of the offense before deciding to indict." U.S. Supp. Br. at 3. The lower courts have made clear that a substantial step is an element of an attempt offense and Petitioner acknowledges that a "a substantial step toward the completion of the offense" is required under the statute. *Id.* at 8. Despite this acknowledged requirement, Petitioner contends first that a substantial step is not a separate element and second that, on its view, the generic allegation of attempt so obviously subsumes the substantial step requirement that it need not be stated. These contentions cannot be squared with the law of attempt and this Court's precedents.

Petitioner's supplemental brief ignores a fundamental, constitutional ruling of this Court – where an indictment "'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must also state the species, – it must descend to particulars.'" *Russell v. United States*, 369 U.S. 749, 765 (1962) (quoting *United States v. Cruikshank*, 92 U.S. 542, 558 (1875)). As demonstrated by the arguments and additional authorities cited in Respondent's Supplemental Brief (at 5-8, 12), this rule applies to attempt crimes especially because of their inchoate nature and the danger that a prosecution will result from acts that are not unlawful or intentions that are not evil. Petitioner does not contest that the term "attempt" is generic or that that the crime is inchoate, rather, Petitioner seems to argue for creation of a new constituent of a criminal offense, not an "element" that must be alleged in an indictment, but an "ingredient[]," U.S. Supp. Br. at 4, that may be "subsumed" in another allegation

but that still must be found by the petit jury. *Id.* at 8. But this novel argument, which is nowhere supported by authority in Petitioner's brief, is entirely circular in that it would excuse the specification of "term of art" elements from an indictment solely because they are "terms of art."

The argument is fatally flawed for two additional reasons. First, Petitioner's argument is directed to the wrong audience. That "attempt" may be a term of art with a definite meaning for counsel is of no moment to grand jurors who exercise a screening function and who must find probable cause for "all the elements necessary to constitute the offense intended to be punished." *United States v. Cruikshank*, 105 U.S. 611, 612 (1881) (noting also that "it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, *directly, and expressly*, without any uncertainty or ambiguity, set forth all the elements") (emphasis added). Lay grand jurors cannot be expected to "supply the requisite components of that element," U.S. Supp. Br. at 7, and Petitioner's argument would therefore dispense altogether with a robust screening function for the grand jury. Second, Petitioner's argument proves too much. In any case where a legal term of art with a definite meaning appeared in the statute at issue, Petitioner's logic would not require an indictment to allege elements that are somehow "subsumed" within the term of art. Such a rule would upset settled law on indictments and risk creating differing standards in the courts as to what "ingredients" or "elements" are fairly subsumed within a "term of art with definite meaning." Thus, on Petitioner's view, an indictment for conspiracy would require no allegations of overt act (even if an element), or manner and means. Nor would a burglary indictment require an allegation of unlawful entry with an intent to commit a felony therein. Such shorthand for lawyers cannot sensibly be foisted upon grand jurors. Thus, both the appraisal and screening functions of the Grand Jury Clause are compromised by Petitioner's approach.

## I. LIKE *RUSSELL*, THE INDICTMENT HERE FAILS TO PROVIDE ADEQUATE NOTICE OF A CRUCIAL FACTUAL ISSUE, RATHER THEN MERELY OMITTING A LEGAL TEST, AS IN *HAMLING*.

Petitioner relies upon *Hamling v. United States*, 418 U.S. 87 (1974), in an effort to distinguish *Russell* and *Cruikshank*. However, the *Hamling* defendants attacked only the notice provided by the indictment;[1] they did not argue that the indictment created the risk that they might be "convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted [them]." *See Russell*, 369 U.S. at 770. Thus, *Hamling* does not speak to Respondent's arguments based upon that portion of *Russell*'s holding.

Further, *Hamling* distinguished *Russell*'s holding as to generic allegations by pointing out that the challenged portion of the *Hamling* indictment involved a legal definition, not a generic term with a factual component. See *Hamling*, 418 U.S. at 118 ("The definition of obscenity, however, is not a question of fact, but one of law; the word 'obscene,' as used in 18 U.S.C. § 1461, is not merely a generic term, but a legal term of art.") The notice issues in *Russell* and *Hamling*, however, differed starkly. The *Russell* defendants knew that the prosecution contended that they had refused to give testimony pertinent to a question under Congressional committee inquiry, but they did not know what the question was. *See Russell*, 369 U.S. at 752-53. Under those circumstances, a grand jury, in making the "ultimate determination" whether to indict, "must necessarily determine what the question under inquiry was." *Id.* at 770. Because the *Russell* defendants lacked notice of that "ultimate

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[1] *See Hamling*, 418 U.S. at 117 ("Petitioners attack the sufficiency of the indictment [because it] failed to give them adequate notice of the charges against them.").

determination," the indictments "violat[ed] the basic principle 'that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him '" *Id.* at 766 (quoting *United States v. Simmons*, 96 U.S. 360, 362 (1877))

> A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest upon one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture

*Id.* Violation of that "basic principle" thus implicates fundamental constitutional rights.

The indictment here implicates the same "basic principle" violated in *Russell*. It not only fails to specify the substantial step it fails to allege one at all. The substantial step is "the conduct element of the offense of attempted unlawful reentry," *see* U.S. Supp. Br. at 8, it ensures that "a party cannot be punished for an evil design, unless he has taken some steps towards carrying it out." *See Bannon v. United States*, 156 U.S. 464, 469 (1895). By failing to allege it, the indictment leaves "the chief issue" – the "conduct element" – undefined. *See United States v. Resendiz-Ponce*, 425 F.3d 729, 733 (9th Cir. 2005) ("a substantial step toward [the] underlying offense is at the very core of an attempt charge"). The error here thus implicates the apprisal function in a way that the omission of a "legal definition of obscenity [that] does not change with each indictment," *see Hamling*, 418 U.S. at 118-19, does not.

## II. THE INDICTMENT VIOLATES RESPONDENT'S RIGHT TO BE PROSECUTED ONLY ON FACTS FOUND BY THE GRAND JURY, AN ISSUE NOT RAISED IN *HAMLING*.

As Petitioner acknowledges, U.S. Supp. Br. at 11-12, the Grand Jury Clause does not merely encompass the notice

issues raised in *Hamling*. It also provides a guarantee that a defendant will be prosecuted only on facts found by a grand jury, a right squarely addressed in *Russell*, but not in *Hamling*. That right alone justifies the Court of Appeals' holding here. *Russell* held that

> [t]o allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the ... grand jury was designed to secure. For a defendant could then be convicted on the basis of acts not found by, and perhaps not even presented to, the grand jury which indicted him.

369 U.S. at 770. *Accord Stirone v. United States*, 361 U.S. 212, 217 (1960) (the defendant enjoys a "substantial right to be tried only on charges presented in an indictment returned by a grand jury"). *See also United States v. Miller*, 471 U.S. 130, 140 (1985) (adopting the analyses in *Stirone* and *Russell*). The Court of Appeals adopted *Russell*'s analysis, describing "the basic institutional purpose of the grand jury" as "ensuring" that a defendant is not convicted except upon facts found by a grand jury. *See Resendiz-Ponce*, 425 F.3d at 732. *See also id.* at 733 ("The defendant ... has a right to have a grand jury consider whether to charge that specific overt act."). Because the indictment did not allege a substantial step, the Court of Appeals properly held that the indictment failed to accomplish that "basic institutional" purpose. *See id.* at 732.

### A. The Screening Function Is Compromised Because The Indictment Does Not Clearly State That The Grand Jury Found That Respondent Committed A Substantial Step.

The indictment here does not allege a substantial step; it merely alleges that Respondent attempted to reenter. Yet there is no dispute that the screening function of the Grand

Jury Clause "ensure[s] that the grand jury has considered all of the elements of the offense before deciding to indict." U.S. Supp. Br. at 3. The words of a statute do not meet this screening purpose unless they clearly and unambiguously set forth the necessary elements of the offense. *Carll*, 105 U.S. at 612. The indictment here certainly does not expressly allege a substantial step. Indeed, Petitioner has never contended that the grand jurors that indicted Respondent were advised of the common law – or generic – meaning of the term "attempt."[2] It is difficult to believe that the grand jury, which throughout its history has functioned as a group of "lay[persons who] conduct their inquiries unfettered by technical rules," *Costello v United States*, 350 U.S. 359, 364 (1956), is so familiar with common law terminology as to necessarily have meant that "the defendant must have engaged in conduct which constitutes a substantial step toward the commission of the crime [that was] strongly corroborative of the firmness of the defendant's criminal intent," see *United States v. Mandujano*, 499 F.2d 370, 376 (5th Cir. 1974), when it charged an attempt.

### B. The Indictment Fails To Descend To Particulars.

But it is not enough that that an indictment state that a defendant engaged in a substantial step – the indictment must be specific, it must "descend to particulars," *United States v Cruikshank*, 92 U.S. 542, 558 (1875); *Russell*, 369 U.S. at 765, in order to satisfy both the notice and screening functions of the Grand Jury Clause. This specificity, which

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[2] Two courts believe that Congress meant something other than the "'definite . . meaning'" of the "term of art" at issue, "'attempt.'" *See United States v. Rodriguez*, 416 F.3d 123, 126 (2d Cir. 2005), *cert. denied*, 126 S.Ct. 1142 (2006); *United States v. Morales-Palacios*, 369 F.3d 442, 447 (5th Cir.), *cert. denied*, 543 U.S. 825 (2004). Respondent believes those cases are wrongly decided, but demonstrate that the inference that the Solicitor General wishes to draw, that the grand jurors necessarily found a substantial step because "attempt" is well-defined, is unwarranted because there are competing meanings of the term.

requires more than simply parroting generic statutory or common law terms, has "retain[ed] [its] full vitality under modern concepts of pleading, and specifically under Rule 7(c) of the Federal Rules of Criminal Procedure." *Russell*, 369 U.S. at 766. Thus, observance of a rigorous standard for indictments is neither an outdated concept nor a prejudicial burden; it is adherence to a constitutional requirement. "An indictment that fails to allege the essential elements of the crime charged offends both the Fifth and Sixth Amendments." *United States v. Pirro*, 212 F.3d 86, 92 (1st Cir. 2000).

Under this rubric, it is clear that the prosecution "need not include *all* of the facts that the government intends to prove at trial" in an indictment. U.S. Supp. Br. at 12. Respondent asserts his "constitutional *right* to know [the substantial step(s)] with which he is charged" rather than his "*need* to know the evidentiary details establishing [that element]." *See United States v. Gordon*, 780 F.2d 1165, 1172 (5th Cir. 1986). However, being relieved of the burden of setting forth its case-in-chief in an indictment is a far cry from freeing the prosecution from providing factual information "sufficient[] [to] apprise[] the defendant of what he must be prepared to meet," *Cochran v. United States*, 157 U.S. 286, 290 (1895), and ensuring that he will be tried only on facts found by the grand jury, *Russell*, 369 U.S. at 770. Although this Court has cautioned against "carry[ing] refinement in a criminal pleading to an impracticable extent," *United States v. Britton*, 107 U.S. 655, 663 (1883), requiring that the prosecution specify the substantial step a defendant is alleged to have taken in his attempt to commit a crime is far from impracticable.

Where the prosecution has evidence of a substantial step, as here, it is not onerous to include it in the indictment. Indeed, in the instant case, the indictment could be made constitutionally sufficient with the addition of a mere seven words. Rather than an indictment which states only that "On

on about June 1, 2003, JUAN RESENDIZ-PONCE, an alien, knowingly and intentionally attempted to enter the United States of America at or near San Luis in the District of Arizona ...," JA at 8, an indictment which properly sets forth both intent and substantial step need only state "On or about June 1, 2003, JUAN RESENDIZ-PONCE, an alien, knowingly and intentionally attempted to enter the United States of America at or near San Luis in the District of Arizona, *by tendering false identification to immigration officers* ..." In this way, the District Court would have had assurance that the grand jury performed its constitutionally mandated screening function by having before it all of the essential elements, *see Hagner v. United States*, 285 U.S. 427, 431 (1932) (the indictment must "contain[] the elements of the offense"), and Respondent would have been apprised that the substantial step the prosecution intended to prove was using a phony identification, rather than physically crossing the border or lying to officers. This constitutional obligation is neither an onerous nor prejudicial burden for prosecutors.

Perhaps because of the ease with which it could have met its constitutional obligations, Petitioner sidesteps the issue of the indictment's insufficiency by focusing on what Respondent later knew of the facts, asserting Respondent "had sufficient notice of the factual evidence that the government possessed of his attempted reentry" because that evidence was disclosed in discovery. U.S. Supp. Br. at 14-15. However, at issue is the sufficiency of the indictment and the notice Respondent had *when the indictment was handed down*, not the ultimate disclosure of the factual predicates of the prosecution's case. Later notice of facts or charges that were constitutionally required to be contained within the indictment, whether obtained through a bill of particulars or discovery, cannot save an invalid indictment. *See Russell*, 369 U.S. at 770. Thus, to the extent that Petitioner relies on *Capone v. United States*, 56 F.2d 927, 931 (7th Cir. 1932), for the proposition that any harm to a defendant arising from

excessive generality in an indictment can be cured by a bill of particulars, U.S Supp. Br. at 16-17, it runs afoul of *Russell*

Petitioner also suggests that requiring compliance with the constitutional requirement that each element, including a substantial step, be alleged will create "some tension" with Fed. R. Crim. P. 31(c) *See* U.S. Supp. Br. at 10 n.7, 17-18. The Court has already held that Rule 31 must be interpreted consistently with the Grand Jury Clause *See Schmuck v. United States*, 489 U.S. 705, 717 (1989) ("a defendant cannot be held to answer a charge not contained in the indictment brought against him") Thus, indiscriminate application of Rule 31(c) to attempt offenses would raise significant constitutional issues in cases where the *mens rea* element differs in the substantive and attempt offenses *Cf.* 2 Wayne R. LaFave, *Substantive Criminal Law* § 11.3(a), at 212-13 n.18 (2d ed. 2003) (noting that for some offenses, "intent will be necessary as to the attempt even if unnecessary as to the completed crime") At any rate, assuming identity of *mens rea*, the Rule's most natural application is to offenses where the defendant has done all that he could to commit the offense yet failed to commit it due to circumstances beyond his control *See, e.g., United States v. Heng Awkak Roman*, 356 F. Supp. 434, 436-37 & n.4 (S.D.N.Y.) (finding defendants guilty, under Fed. R. Crim. P. 31, of attempted possession of heroin where defendants took possession of a suitcase containing soap powder, not heroin, "where the defendants' actions would have constituted the completed crime if the surrounding circumstances were as they believed them to be"), *aff'd*, 484 F.2d 1271 (2d Cir. 1973) In such circumstances, the grand jury's finding that the defendant committed the offense (necessarily made in indicting on the completed offense) subsumes the substantial step of doing everything necessary from the defendants' perspective

Ultimately, although the prosecution's indictment gave Respondent notice that he was charged with attempted reentry, he was never provided constitutionally sufficient

notice of the essential elements of that crime – in other words, he was not apprised of the substantial step that the prosecution would attempt to prove and against which he would have to defend. Nor was Respondent protected against being tried on facts not found by the grand jury.

## CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA,

*Petitioner,*

v.

JUAN RESENDIZ-PONCE,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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## QUESTION PRESENTED

Whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error.

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

*Amicus Curiae* the National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation of more than 10,000 attorneys and 28,000 affiliate members in all 50 States. The American Bar Association ("ABA") recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

Founded in 1958, NACDL promotes research in the field of criminal law, disseminates and advances knowledge relevant to that field, and encourages integrity, independence, and expertise in criminal defense practice. NACDL works tirelessly to ensure the proper administration of justice, an objective that this case directly impacts in light of its overarching importance to the institution of the federal grand jury. Accordingly, NACDL and its membership, whose daily practice includes grand jury matters, are uniquely qualified to offer assistance to the Court in this case.

## SUMMARY OF ARGUMENT

After contending otherwise throughout this criminal proceeding, Petitioner United States now concedes that the indictment in this matter did not charge a crime. Pet. Br. 10. In this respect, the indictment here was no indictment at all, just as a search warrant that nowhere specifies the place to be searched or the items to be seized provides no "warrant" for any search. Nonetheless, prosecutors brought Respondent Resendiz-Ponce to trial on this non-charge, over his vehement and timely objection. The court of appeals reversed on the ground that the indictment failed to charge a crime because it

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[1] Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored any part of this brief, and no person or entity, other than the *amicus curiae*, its members and its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk.

omitted an essential element—the overt act. Thus, the issue in this case is whether proceeding to trial on the non-charge, for which Mr. Resendiz-Ponce's grand jury never found probable cause, constitutes structural error.

This Court's recent opinion in *United States* v. *Gonzalez-Lopez*, 126 S. Ct. 2557 (2006), governs this issue as it sets forth a clear and precise definition of structural error. Rather than the narrow position taken by Petitioner in its opening brief that "structural" errors are only those rendering the trial "fundamentally unfair," Pet. Br. 7,[2] the opinion in *Gonzalez-Lopez* makes clear that fundamental unfairness is not the "single, inflexible criterion" defining structural error. Rather, structural errors bear not only on "the framework within which the trial proceeds," *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991), but also on "whether it proceeds at all." *Gonzalez-Lopez*, 126 S. Ct. at 2565. Under *Gonzalez-Lopez*, therefore, structural error more specifically exists where the error: (1) has consequences that are necessarily difficult to assess; (2) renders the succeeding criminal trial fundamentally unfair; (3) is not logically amenable to application of harmless error analysis. All three criteria are met here.

In the case of a defective indictment, any inquiry into the harmlessness of the error would require impermissible and impossible speculation by a reviewing court. Because the very language of the Fifth Amendment prohibits trials founded on an invalid indictment, any trial conducted on the basis of an indictment which fails to set forth all the elements of the crime charged is, by definition, fundamentally unfair. In addition, because Petitioner was not required to allege an essential element of the offense, Petitioner was free to shift its

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[2] Petitioner repeatedly contends, as it did in *Gonzalez-Lopez*, that only errors which satisfy the second, fundamental fairness criterion, warrant treatment as structural errors. Pet. Br. 7, 14, 15 & 22; *Gonzalez-Lopez*, 126 S. Ct. at 2562.

theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal. Such prosecutorial roaming is directly contrary to this Court's precedents, and impermissibly undermined Respondent's ability to defend his case at trial.

Historical and policy considerations further mandate a finding of structural error in this matter. Application of harmless error analysis would eviscerate the long-established and deliberate institutional bifurcation of the grand and petit juries, a bifurcation maintained for over eight centuries of Anglo-American common law. The American grand jury is unique and distinct from the petit jury, with broader powers and far greater autonomy. Prosecutorial usurpation of the grand jury's critical functions to determine probable cause and to shield putative defedants from the inconvenience, expense and opprobrium of a federal criminal trial is entirely inconsistent with the grand jury's historical importance and renders the grand jury's fundamental role superfluous. Because of the institutional bifurcation in our federal criminal justice system, subsequent conviction by a petit jury cannot cure the harm that a defective indictment causes.

Moreover, application of harmless error to a wholly invalid indictment would require the Court to overrule its own long-established precedent holding that a defendant cannot be convicted on a charge the grand jury never made against him, *Stirone* v. *United States*, 361 U.S. 212, 219 (1960), and would allow Respondent to be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him. *Russell* v. *United States*, 369 U.S. 749, 770 (1962).

Policy considerations also strongly support reversal of convictions founded on constitutionally deficient indictments. Rather than grant defendants a windfall, as argued by Petitioner, holding that the omission of an essential element is structural error will instead ensure: (1) that prosecutors take care to allege each of the essential elements of an offense, as

required by the Constitution; (2) that defendants timely object to facially invalid and defective indictments; and (3) that district courts exercise proper and necessary vigilance to avoid the constitutional error.

## ARGUMENT

### I. DEPRIVATION OF THE RIGHT TO INDICTMENT BY GRAND JURY IS STRUCTURAL ERROR.

The Court's recent opinion in *United States* v. *Gonzalez-Lopez* outlines three circumstances in which an error is termed "structural": (1) if its consequences are necessarily difficult to assess, (2) if it necessarily renders the criminal proceeding fundamentally unfair; *or* (3) if the harmless-error inquiry is irrelevant to remedying the constitutional error. 126 S. Ct. at 2564 n.4. The Court's use of the disjunctive demonstrates that each can provide an independent basis for finding a structural defect.

First, a defect is structural if it has "'consequences that are necessarily unquantifiable and indeterminate.'" *Id.* at 2564 (quoting *Sullivan* v. *Louisiana*, 508 U.S. 275, 282 (1993)); see also *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986) ("when a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained"); *Waller* v. *Georgia*, 467 U.S. 39, 46 n.4 (1984) (violation of the public-trial guarantee is not subject to harmlessness review because "the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance").

Second, a defect is structural if it "'necessarily render[s] a trial fundamentally unfair'" and "deprive[s] defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be

regarded as fundamentally fair.'" *Neder* v. *United States*, 527 U.S. 1, 8-9 (1999) (omission in original) (internal citation omitted).

Finally, an error is structural if it is not logically amenable to harmless-error analysis. For example, if a defendant would ordinarily be prejudiced by *exercising* a constitutional right, such as self-representation, then it is impossible for a court to assess the prejudice resulting from the deprivation of that right. See *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984) ("Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis.").

The error in the present case meets all three criteria, especially the first (unquantifiable and indeterminate) and third (not logically amenable to harmless error analysis), thus, it "unquestionably qualifies as 'structural error.'" *Sullivan* v. *Louisiana*, 508 U.S. 275, 282 (1993).

### A. An Indictment's Failure To State An Offense Has Consequences That Are Necessarily Unquantifiable, Indeterminate And Not Logically Amenable To Harmless Error Analysis.

The prejudice caused by the error in this case is "unquantifiable and indeterminate," *Sullivan*, 508 U.S. at 281-82, and not properly reviewed under a harmless error analysis. The error here occurred in the grand jury context, where the proceedings are ex parte and secretive. As a result, a reviewing court is incapable of assessing what a grand jury did or did not do. Indeed, a reviewing court can have no confidence that it was error at all because the grand jury might deliberately have declined to find probable cause for an overt act and therefore removed that element from the indictment. While remote, this possibility demonstrates the absolute inability of a reviewing court to assess what a grand jury did or did not do. "[T]here is no *object*, so to speak,

upon which harmless-error scrutiny can operate." *Id.* at 280. Thus, "even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction," we cannot be sure that the error leading to the indictment's insufficiency did not affect the "*very existence* of the proceedings to come." *Vasquez*, 474 U.S. at 263 (emphasis added).

While it may be presumed that a grand jury proceeding transpires with all due regularity (see *United States* v. *Johnson*, 319 U.S. 503, 512-13 (1943); see also *United States* v. *Mechanik*, 475 U.S. 66, 75 (1986) (O'Connor, J., concurring in judgment)), where there is "particularized proof of irregularities in the grand jury process," this "presumption of regularity ... may be dispelled." *Id.* A violation of the Indictment Clause's requirement that an indictment must be "returned by a legally constituted and unbiased grand jury [and] *valid on its face*," *Costello* v. *United States*, 350 U.S. 359, 363 (1956) (internal footnote omitted) (emphasis added), is precisely the brand of "particularized proof" that overcomes any presumption of regularity.

Like an illegally constituted and possibly biased grand jury, such as those at issue in *Vasquez* or *Ballard* v. *United States*, 329 U.S. 187 (1946), an indictment that omits an essential element of the offense represents an intolerable encroachment on the grand jury's structural protections. That is, the indictment's patent failure to meet the Fifth Amendment's requirements could not have been caused by anything other than an irregularity in the proceedings. The error is strong proof that the grand jury either did not find probable cause as to the omitted element or did not even consider facts relevant to the element. Part of the difficulty in reviewing insufficient indictments, therefore, is in determining the nature of the violation.

On this point, Petitioner attempts to characterize *Vasquez* as involving an "'isolated exception[]' to the harmless error rule" that turned solely on race discrimination in the grand jury. Pet. Br. 20 (alteration in original) (citing *Bank of Nova*

*Scotia* v. *United States*, 487 U.S. 250, 256 (1988)). But this is an incomplete reading of *Bank of Nova Scotia*. The Court does not say that *Vasquez* itself is an isolated exception, but that it is *among a class of cases that are exceptions* to the general rule that most constitutional errors are subject to harmless error analysis. Indeed, *Vasquez* "exemplifies" cases "in which the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice." *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 257 (1988).[3] Accordingly, *Bank of Nova Scotia* should not be read to stand for the proposition that *Vasquez* is the *only* type of grand jury error that is structural, as Petitioner suggests. Pet. Br. 19. See NAFD *Amicus* Br. 10-18.

### B. The Error In This Case Is Structural Because It Renders The Trial Fundamentally Unfair.

An indictment that fails to state an offense is also structural error because it "necessarily render[s] a trial fundamentally unfair [and] deprive[s] defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair." *Neder*, 527 U.S. at 8-9 (internal citations omitted) (omission in original). In a federal criminal case, proceeding to trial on an indictment that is so deficient that it

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[3] The Court's opinion in *Bank of Nova Scotia* v. *United States*, 478 U.S. 250 (1988), observes that demonstrated irregularities in the grand jury process are in fact structural errors, although the Court did not categorize them as such at the time. According to *Bank of Nova Scotia*, such errors signify that "the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, *allowing the presumption* of prejudice." *Id.* at 257 (emphasis added). Consequently, "any inquiry into harmless error [requires] unguided speculation," *id.*, and such speculation cannot be the foundation for logical analysis.

fails to charge a crime renders the subsequent criminal trial "fundamentally unfair," as this Court has used that term.

Here, the claim of fundamental unfairness relies not upon the Fifth Amendment's general guarantee of Due Process, but upon its specific and emphatic guarantee that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const., amend. V. While it is true that this Court has "'defined the category of infractions that violate "fundamental fairness" very narrowly' based on the recognition that, 'beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation,'" *Medina* v. *California*, 505 U.S. 437, 443 (1992) (alteration omitted), the question presented in this case concerns one of the more specific guarantees that the Framers articulated[4] in that the language of the Indictment Clause contains its own remedy—"no person shall be held to answer" absent an indictment. The omission of a required element from the indictment is a "defect so fundamental that it causes the grand jury no longer to be a grand jury, or the indictment no longer to be an indictment." *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 802 (1989). The indictment in this case fails to state an offense and therefore

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[4] The origins of the Indictment Clause stretch back to the Magna Charta. According to Sir Edward Coke, the core meaning of the term "by the law of the land" was "indictment or presentment of good and lawful men," *i.e.*, the grand jury. Edward Coke, *The Second Parts of the Institutes of the Laws of England* *50-51. *See also* 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1783 n.50 (Boston: Hillard, Gray & Co. 1833). Early editions of Chancellor Kent's *Commentaries on American Law* are even more emphatic: "The words by the *law of the land*, as used in *magna charta*...are understood to mean due process of law, that is, by indictment or presentment of good and lawful men; and this, says Lord Coke, is the true sense and exposition of those words." 2 James Kent, *Commentaries on American Law* 13 (New York: Clayton & Van Norden, 2d ed. 1832) (citations omitted); *see also* Akhil Reed Amar, *The Bill of Rights* 97 n.62 (1998).

warrants the remedy specified in the Indictment Clause, the right not to be tried.

The Court has observed the pernicious effects of such an error. Where an indictment fails to include all the elements of what the prosecution must prove at trial, "the indictment...[leaves] the prosecution free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." *Russell*, 369 U.S. at 768. "At every stage in the ensuing criminal proceeding [the defendant] was met with a different theory, or by no theory at all" regarding the omitted element. *Id.* Further, where a criminal prosecution is allowed to proceed upon an indictment that omits such elements, it "enables [a defendant's] conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture." *Id.* at 766.

From the outset, Respondent's trial counsel complained of those effects here. As noted, at the pre-trial hearing on the motion for dismissal, counsel implored the District Court to order the prosecution to articulate what overt act or acts it intended to prove, to no avail. JA 20.

In sum, in light of deprivation of a specific constitutional guarantee, the Constitution's articulation of a remedy for such a deprivation and the pernicious effects of such a deprivation, the Court should hold that the error that occurred here is structural. To hold otherwise, as explained in the ensuing section, would effect a fundamental change in the criminal process.

## II. CONSTITUTIONAL GRAND JURY ERROR REQUIRES A COURT TO DISMISS AN INDICTMENT WHEN THE DEFENDANT PROPERLY PRESERVES A TIMELY OBJECTION TO SUCH ERROR.

The indictment in this case was insufficient constitutionally to bring Respondent to trial. Because Respondent diligently pursued his objection to this constitutional error, this Court's precedent mandates dismissal of the indictment.

Constitutional grand jury errors violate one or more of the three requirements of the Indictment Clause, as laid out in *Costello*.[5] 350 U.S. at 363. There, Justice Black held that "[a]n indictment returned by a [1] legally constituted and [2] unbiased grand jury ... [3] if valid on its face, is enough to call for trial of the charge on the merits." *Id.* (internal footnote omitted).[6] In contrast, non-constitutional grand jury errors may occur during the grand jury process, but these would not violate the three requirements of the Indictment Clause.

### A. Properly Preserved Constitutional Grand Jury Error Results In Reversal.

In every case in which a defendant preserved his or her timely objection to constitutional grand jury error, this Court has adhered to a strict rule of mandatory reversal. See *Vasquez*, 474 U.S. at 256 (racial discrimination in the composition of the grand jury); *Russell*, 369 U.S. at 771-72

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[5] Indeed, in the present case Petitioner agrees that the facial invalidity of the indictment was a "*constitutional* grand jury error[]." *See, e.g.*, Pet. Br. 20.

[6] Labeling violations of the *Costello* requirements as "constitutional grand jury error" indicates, *inter alia*, the narrow effect of our suggested holding. Of course, this Court need not consider whether violations in these three areas are the sole constitutional errors that can occur in the grand jury proceedings. Rather, it is sufficient to say that the present case implicates only the requirement of facial validity.

(omission of an essential fact from an indictment); *Stirone*, 361 U.S. at 219 (constructive amendment of the indictment without the grand jury); *Batchelor* v. *United States*, 156 U.S. 426, 432 (1895) (indictment set forth general allegations but did not allege all essential elements with sufficient specificity); and *Strauder* v. *West Virginia*, 100 U.S. 303, 304 (1879) (racial discrimination in the composition of the grand jury), *abrogated on other grounds by Taylor* v. *Louisiana*, 419 U.S. 522 (1975). This rule of mandatory reversal is supported by the need to protect the constitutional values underlying the Indictment Clause and the grand jury institution itself.

Like *Russell*, *Stirone*, and *Batchelor*, the present matter implicates the constitutional requirement that an indictment be facially valid. The prosecution in this case violated this requirement in two ways, each of which mandates reversal under this Court's precedents. First, the indictment failed to state an offense, which is reversible under *Russell*. Second, the prosecution constructively amended the indictment to obtain conviction, which is reversible under *Stirone*.

The three primary criteria for testing the sufficiency of the indictment are: (1) whether it "contains the elements of the offense charged"; (2) whether it "fairly informs a defendant of the charge against which he must defend"; and (3) whether it "enables him to plead an acquittal or conviction in bar of future prosecution for the same offense." *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). These criteria serve to uphold the threefold constitutional function of the facial validity requirement. See, *e.g.*, 24 James W. Moore et al., *Moore's Federal Practice* § 607.02[2][a] (3d ed. 2006). *First*, the facially valid indictment enforces the Indictment Clause's command that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const., amend. V. *Second*, it implements the Sixth Amendment's "apprisal" requirement that "[i]n all criminal prosecutions, the

accused shall enjoy the right to ... be informed of the nature and cause of the accusation." *Id.*, amend. VI. *Third*, it protects the accused from reprosecution for the same offense in furtherance of the Fifth Amendment's double jeopardy provision. *Id.* As this Court recognized in *Russell* and *Stirone*, a reviewing court must dismiss a facially invalid indictment—at least where the accused makes a timely objection to this error—because it necessarily deprives the defendant of at least one of these three constitutional guarantees.

The indictment in this case involves the precise error that this Court held to be reversible in *Russell*. The defendants in *Russell* were indicted for refusing to answer questions when summoned before a congressional subcommittee, in violation of 2 U.S.C. § 192. A federal grand jury returned an indictment that failed to specify the "nature of the 'question then under inquiry' to which the questions addressed to defendant[s] [were] alleged to be relevant." *Russell*, 369 U.S. at 753 n.5 (quoting a "typical" motion to dismiss). The defendants filed a timely objection to this omission. *Id.* at 752-53. In reviewing the objection, this Court determined that the subject under inquiry was an essential element of a violation of 2 U.S.C. § 192. *Id.* at 771. Because the grand jury failed to return an indictment on this essential element, this Court reversed the conviction. *Id.* at 771-72, 767 (holding that the indictment failed: (1) "to inform the defendant of the nature of the accusation against him;" and (2) to limit an individual's criminal liability "to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.") (internal citation omitted).

In this case, Petitioner concedes that the indictment does not contain all of the essential elements for the offense charged, and that the error was constitutional. Pet. Br. 10. Indeed, the grand jury charged Respondent with only four of the five essential elements of the offense of attempted reentry,

8 U.S.C. § 1326. *United States* v. *Gracidas-Ulibarry*, 231 F.3d 1188, 1196 (9th Cir. 2000) (en banc). Under this indictment, therefore, Petitioner brought Respondent to trial upon charges of (1) being a non-U.S. citizen, who (2) had the conscious desire to reenter the United States without the permission of the Attorney General (3) after having been previously deported from the United States and who (4) did not actually receive the Attorney General's consent to return. This charge, standing alone, is not a federal criminal offense. Not only does this indictment fail to allege the elements of the offense set forth by the Ninth Circuit in *Gracidas-Ulibarry*, but it also completely fails to allege any *actus reus* whatsoever. The indictment in this case thus fails to meet the standards for facial validity set out by this Court in *Hamling*, 418 U.S. at 117.

Moreover, because the district court erroneously permitted Respondent's trial to proceed despite the indictment's failure to state an offense, the prosecution was forced to constructively amend the indictment in order to obtain a conviction. But as this Court has recognized, constructive amendment of an indictment violates an individual's "substantial right to be tried only on charges presented in an indictment returned by a grand jury." *Stirone*, 361 U.S. at 217. This violation "is far too serious to be treated as nothing more than a variance and then dismissed as harmless error," and requires reversal. *Id.* Consequently, the indictment in this case also suffers from the same defect mandating reversal in *Stirone*. *Id.* (prosecution adduce evidence of alleged improper interference with products not specified in the indictment).

It is a settled principle of law that constructively amended indictments are reversible without inquiry into the weight of evidence presented to the petit jury. See 24 Moore, *supra* § 607.06[1] at 607-43 ("Constructive amendment of the indictment may deprive the defendant of the Fifth Amendment guarantee to indictment by a grand jury and is

reversible error per se."). "[W]here trial evidence has amended the indictment by *broadening* the possible bases for conviction from that which appeared in the indictment, the variance violates the defendant's substantial right to be tried only on charges returned by a grand jury." *United States* v. *Lee*, 359 F.3d 194, 208 (3d Cir.) (citations and alterations omitted), *cert. denied*, 543 U.S. 955 (2004). "If, on the other hand, the variance does not alter the elements of the offense charged, [courts] focus upon whether or not there has been prejudice to the defendant." *Id.* (citations omitted, alterations in original).

Here the indictment necessarily broadened the basis for conviction—in that the grand jury's indictment provided *no basis* for conviction. As a result, the prosecution violated Respondent's "substantial right to be tried only on charges presented in an indictment returned by a grand jury." *Stirone*, 361 U.S. at 217. Therefore, because Respondent properly preserved his objection to such a deprivation of a substantial right, reversal is the only appropriate remedy.

### B. In Contrast, *Unobjected-To* Constitutional Grand Jury Error Is Subject To Plain-Error Analysis And Thus Does Not Require Reversal In Every Case.

In cases where constitutional grand jury error occurs, yet the defendant fails to file a timely objection (or did not properly preserve this objection on appeal), this Court has reviewed such violations under a plain-error analysis. See *United States* v. *Cotton*, 535 U.S. 625, 628-29 (2002) (affirming conviction despite omission from indictment of an *Apprendi* sentence-enhancing fact); *Davis* v. *United States*, 411 U.S. 233 (1973) (not reversing conviction despite racial discrimination in composition of the grand jury); *Silber* v. *United States*, 370 U.S. 717, 717-18 (1962) (per curiam) (dismissing indictment due to omission of an essential fact

from the indictment);[7] *Ballard*, 329 U.S. at 189 (dismissing indictment due to sex discrimination in the composition of the grand jury). In each of these cases—and despite the fact that such constitutional defects ordinarily require reversal—the outcome depended on such factors as whether the "error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" *United States* v. *Olano*, 507 U.S. 725, 732 (1993). Respondent in this case, far from sleeping on his rights, filed a timely objection and properly preserved his objection on appeal. Thus, a plain-error analysis is inappropriate here.

### C. A Finding That An Error Is Not "Plain" Within Meaning Of Rule 52(b) Does Not Imply That The Error Is Not Also Structural.

Petitioner relies upon this Court's statement that structural errors "*necessarily* render a [criminal] trial fundamentally unfair," *Rose* v. *Clark*, 478 U.S. 570, 577-78 (1986) (emphasis added), to support the proposition that if an error is not "plain" under Rule 52(b), then that error cannot also be structural. See Pet. Br. 22. But this Court explicitly rejected Petitioner's contention because it would "creat[e] a single, inflexible criterion, inconsistent with the reasoning of our precedents." *Gonzalez-Lopez*, 126 S. Ct. at 2564 n.4. As discussed above, it is readily apparent that Petitioner's myopic conception of structural error is incorrect.

Petitioner's argument on this point cannot be squared with this Court's decisions in *Vasquez* and *Davis*. *Vasquez* held

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[7] Although the defendant in *Silber* filed a timely pre-trial objection to the insufficiency of the indictment, he did not preserve this objection on appeal. The Court stated that an appellate court "'may, of [its] own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.'" 307 U.S. at 718 (quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)). As such, it is clear that this Court reviewed that case for plain error.

that racial discrimination in the selection of a grand jury is a "systemic flaw in the charging process" and thus "requires ... continued adherence to a rule of mandatory reversal." 474 U.S. at 264. The defendant in *Vasquez* objected to the constitutional error before trial and properly preserved the objection on appeal. *Id.* at 256, 261. *Davis* poses an instructive contrast. There, this Court faced the precise error it found to be reversible in *Vasquez*, but the defendant did not object to the constitutional error until three years after his conviction. *Davis*, 411 U.S. at 235. The Court held that the "waiver standard expressed in Rule 12(b)(2) governs an *untimely* claim of grand jury discrimination, not only during the criminal proceeding, but also later on collateral review." *Id.* at 242 (emphasis added). Under the waiver standard now expressed in Fed. R. Crim. P. 12(b)(3), therefore, the defendant's failure to make a timely objection to the *Vasquez* error precluded reversal absent a showing of cause.[8]

When contrasted to *Vasquez*, *Davis*'s result suggests that a defendant's failure to object can be dispositive on the question whether a structural error requires reversal. That is, while a court *must* reverse upon reviewing a preserved objection to structural error, "[i]n the context of such unobjected-to error, the mere deprivation of substantial rights

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[8] This finding is consistent with this Court's holdings in various grand jury discrimination cases. *See, e.g., Francis* v. *Henderson*, 425 U.S. 536 (1976) (defendant raised grand jury discrimination claim six years after conviction; Court denied relief on exhaustion grounds); *Tollett* v. *Henderson*, 411 U.S. 258 (1973) (defendant raised grand jury claim twenty-one years after conviction; Court held that claim was foreclosed because petitioner had pleaded guilty pursuant to competent legal advice); *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341 (1963) (petitioners raised grand jury discrimination claim four years after their trial and the Court held that Rule 12(b)(2) waiver provisions applied and that petitioners failed to show cause); *accord Hollis* v. *Davis*, 941 F.2d 1471 (11th Cir. 1991) (defendant's failure to make timely objection to grand jury composition in state trial court constituted waiver despite Court's holding in *Vasquez*).

'does not, without more' warrant reversal." *Neder*, 527 U.S. at 34 (quoting *Olano*, 507 U.S. at 737) (Scalia, J., dissenting). This result cuts strongly against Petitioner's argument that structural errors always require reversal because they render the criminal proceedings "fundamentally unfair" in every case. Pet. Br. 21-23.

The Court's decision in *United States* v. *Cotton*, 535 U.S. 625 (2002), therefore does not aid Petitioner's cause. The indictment in *Cotton* was adequate, facially, to initiate prosecution, only for a lesser offense. In that case, the defense failed to raise an objection and therefore exposed the defedant to a trial and to evidence that the drug quantity at issue was larger than that indicated by the indictment. Not so here, where the indictment was, as Petitioner's concedes, facially *invalid* and where the defense raised a timely objection to the indictment, which should have prevented a trial from going forward at all.

Moreover, although the error here and the error in *Cotton* implicate defects in the indictments' *apprisal* function, the error in the present case also reflects fault in (or the complete absence of) the grand jury's *screening* function. Where this later "screening" function is directly implicated, no logical means of discerning what happened in the grand jury exists. The grand jury's failure to find probable cause for the commission of an overt act suggests that either (1) the grand jury never viewed evidence of probable cause on the element, or (2) the grand jury refused to find probable cause on the element. In either case, Respondent was deprived of the screening process to which he is guaranteed by the Constitution. Accordingly, the omission in this case "impugned the fundamental fairness of the process itself so as to undermine the integrity of the indictment." *Hobby* v. *United States*, 468 U.S. 339, 345 (1984).

### D. Non-Constitutional Grand Jury Errors, Such As Those In *Mechanik* And *Bank Of Nova Scotia*, Are Subject To Harmless-Error Review.

In contrast, non-constitutional grand jury errors are subject to harmless-error analysis. See *Bank of Nova Scotia*, 487 U.S. 250 (various violations of Fed. R. Crim. P. 6); *Mechanik*, 475 U.S. 66 (where two agents testified in tandem before the grand jury, in violation of Fed. R. Crim. P. 6(d)); *United States* v. *Lane*, 474 U.S. 438 (1986) (misjoinder of defendants in the indictment in violation of Fed. R. Crim. P. 8(b)); *Hobby* v. *United States*, 468 U.S. 339 (1984) (racial discrimination in the selection of a grand jury foreperson); [9] *Berger* v. *United States*, 295 U.S. 78 (1935) (not reversing conviction despite *technical* variance between the indictment and proof at trial). Non-constitutional grand jury errors are those that occur during the grand jury proceedings, but which do not violate the broader constitutional requirement that the indictment be "returned by a legally constituted and unbiased grand jury [and] valid on its face." *Costello*, 350 U.S. at 363 (internal footnote omitted).

Non-constitutional grand jury errors are subject to harmless-error review because they are not so intrinsically harmful that they "compromis[e]" the "structural protections of the grand jury," *Bank of Nova Scotia*, 487 U.S. at 257, or that the error "impugns the fundamental fairness of the process itself so as to undermine the integrity of the indictment." *Hobby*, 468 U.S. at 345. Consequently, this Court has held that such errors require reversal only where they had "substantial influence" on the outcome of the grand

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[9] Although the defendant in *Hobby* pursued his claim under the Equal Protection Clause of the Fourteenth Amendment, this error was non-constitutional with respect to the Fifth Amendment. Unlike the claims involved in *Vasquez* and *Ballard*, the Court deemed the role of the foreperson to be largely ministerial and constitutionally insignificant in relation to the defendant's rights under the Indictment Clause. *Hobby*, 468 U.S. at 345

jury proceeding. *Bank of Nova Scotia*, 487 U.S. at 256. Thus, this Court applies a more rigorous standard in reversing non-constitutional grand jury errors, in part because these procedural errors implicate an individual's constitutional right only tangentially, if at all.

Petitioner argues that constitutional and non-constitutional grand jury errors should be reviewed alike. Pet. Br. 17-20. This argument fails because it does not reflect the "heightened regard [this Court has] for constitutional protections." *Lane*, 474 U.S. at 446 n.9, in the grand jury context. Constitutional errors such as those in *Vasquez*, *Russell*, *Stirone* and *Ballard* have warranted automatic reversal or treatment as "structural errors." As a comparison of the constitutional and non-constitutional error cases makes clear, the nature of the grand jury error directly informs whether any such defect may be reviewed for harmless error. Thus, Petitioner's argument that the omission of an overt act from an indictment is no different from non-constitutional error and therefore subject to harmless error review is untenable.

## III. APPLICATION OF HARMLESS ERROR ANALYSIS WOULD EVISCERATE THE LONG ESTABLISHED INSTITUTIONAL BIFURCATION OF THE GRAND AND PETIT JURIES.

In the context of a constitutionally deficient indictment, undertaking a harmless error analysis requires examination and retroactive application of materials presented to the petit jury (under a separate standard of proof and for separate purposes) to the unknown and unknowable events before an entirely separate and earlier constituted grand jury. Petitioner claims that the higher standard of proof under which the petit jury considers such evidence guarantees that, once found by the petit jury, any omitted fact would necessarily have been found by any rational grand jury. Petitioner is correct about the inevitable results of the application of a harmless error analysis, but this result entirely ignores the separate role and

function of the grand jury in our intentionally bifurcated criminal process.

### A. The Institutional Bifurcation Of The Grand And Petit Juries Is Grounded In More Than Eight Centuries Of Anglo-American Jurisprudence.

Grand juries have long held a dual role of investigative and protective functions; neither of which are entirely determined by the evidence presented to that body by the prosecutor. In the early 11th century, the first grand juries were fearsome accusatory bodies of laymen authorized to assist the Crown as quasi-prosecutors and established to increase the number of prosecutions. Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. Rev. 1, 4-5 (2002). Eventually, however, the grand jury earned a dual reputation as a protector of the innocent from unfounded charges. *United States* v. *Navarro-Vargas*, 408 F.3d 1184, 1190 (9th Cir.), *cert. denied*, 126 S. Ct. 736 (2005); 1 Sara Sun Beale et al., *Grand Jury Law and Practice* § 1:2 (2d ed. 2001). In 1352, King Edward III promulgated a statute that allowed a defendant to challenge the inclusion of any member of a trial jury who had also served on the grand jury. I Pollock & Maitland, *The History of English Law* 649 (2d ed. 1923). That statute required a complete bifurcation between the two institutions allowing for independent evaluation of evidence against the accused by two independent bodies. Beale, *supra*, § 1:2.

The American colonies adopted the grand jury in the early 1600's.[10] *Id.* at § 1:3. The Founders believed that the grand jury was "so essential to basic liberties that they provided in the Fifth Amendment that federal prosecutions for serious crimes can only be instituted by 'a presentment or indictment of a Grand Jury.'" *United States* v. *Calandra*, 414 U.S. 338,

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[10] According to Beale, grand juries existed as early as 1625 in Virginia, 1635 in Massachusetts, 1637 in Maryland, 1640 in Rhode Island and 1643 in Connecticut. Beale, *supra* § 1:3.

343 (1974). Moreover, consensus suggests that the federal grand jury "was intended to operate substantially like its English progenitor." *Costello*, 350 U.S. at 362. William Blackstone, whose views of the common law were highly influential at the time of the founding,[11] envisioned the grand jury as a shield for the protection of individual liberty. Gregory T. Fouts, Note, *Reading Grand Jurors Their Rights: The Continuing Question of Grand Jury Independence*, 79 Ind. L. J. 323, 324 n.34 (2004). The *Commentaries* highlight the significance of the grand jury as a wholly separate evaluator of evidence, and its importance in maintaining an independent perspective in determining whether an indictment should be returned, even where probable cause may exist to do so. See NAFD *Amicus* Br. ___

From the perspective of those seeking to include the grand jury clause in the Bill of Rights, the grand jury's discretion as to whether to indict at all was arguably its most important feature. 4 Wayne R. LaFave et al., *Criminal Procedure* § 15.2(g) (2d ed. 2006). This screening function of the American grand jury debuted in 1793, when three successive grand juries refused to indict publisher John Peter Zenger for libel against the Governor of New York. *Navarro-Vargas*, 408 F.3d at 1192, 1199. Likewise, colonial grand juries refused to indict editors of the Boston Gazette for libel against the Governor of Massachusetts, as well as the leaders of the Stamp Act Rebellion. Simmons, *supra*, at 11-12.

The American grand jury remains a unique governmental institution, not "textually assigned ... to any of the branches described in the first three Articles [of the Constitution]." *United States* v. *Williams*, 504 U.S. 36, 47 (1992). The grand jury's independence from the three branches derives from its

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[11] While the last volume of Blackstone's Commentaries was published in 1769 in England, in 1772, 1000 copies were in circulation in the United States, and there were already 1400 advance orders for the first American issue. Beale, *supra* §1:4 n.4.

intended function "as a kind of buffer or referee between the Government and the people." *Id.* (citing *Stirone*, 361 U.S. at 218, *Hale* v. *Henkel*, 201 U.S. 43, 61 (1906)). Concomitant with its institutional independence is an ability to conduct its operations "free from technical rules." *Costello*, 350 U.S. at 362. Unlike a court, the jurisdiction of which is "predicated upon a specific case or controversy," the grand jury "can investigate merely on suspicion that the law [has been] violated." *Williams*, 504 U.S. at 48 (internal quotation marks omitted) (quoting *United States* v. *R. Enters., Inc.*, 498 U.S. 292, 297 (1950)). A grand jury may return an indictment entirely on the basis of hearsay evidence, *Costello*, 350 U.S. at 363, or it may refuse to return a proffered indictment without articulation of any reason for doing so. Bruce H. Schneider, *The Grand Jury: Powers, Procedures and Problems*, 9 Colum. J.L. & Soc. Probs. 682, 728 (1973).

Given the breadth of it powers and the lack of any precise standard of decision making, the grand jury is now, and always has been, a far different body from the petit jury. Its lack of constraint, especially in performing its protective or screening function, therefore precludes inferences regarding what a "rational" grand jury inevitably would have done. See *Russell*, 369 U.S. at 770 ("To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure.") Application of harmless error analysis based upon evidence presented to the petit jury is therefore an exercise that bridges what history has long kept separate.

**B. *Neder* Does Not Reach This Case.**

To avoid the conclusion that the error in this case was structural, Petitioner relies on *Neder* v. *United States*, which is inapposite. In *Neder*, the Court concluded that that the omission of an offense element from a jury instruction was amenable to harmless error analysis. 527 U.S. at 19-20. The

error occurred in the presentation of the case to the petit jury, and the Court refused to reverse the conviction on account of the overwhelming evidence supporting the jury's verdict. *Id.* at 18. *Neder* did not involve a facially invalid indictment, but rather "'simply...error in the trial process itself,'" *Id.* at 8 (quoting *Fulminante*, 499 U.S. at 310), regarding who would decide the question of materiality. Accordingly, the error could be logically assessed in the context of the rest of the evidence presented to the jury during the course of the trial and did not constitute structural error. See *id.* at 18.

Petitioner contends that it "necessarily follows" from *Neder* "that the omission of an offense element from a federal indictment is not structural error either." Pet. Br. 13. But this assertion ignores the Court's very recent recognition that *Neder* governs constitutional errors "at trial alone." See *Washington* v. *Recuenco*, 126 S. Ct. 2546, 2551 (2006). Moreover, it ignores entirely the eight centuries of common law, discussed above, distinguishing the grand jury as a unique institution that is formally and functionally distinct from the petit jury. Most fundamentally, a grand jury proceeding "is not an adversary hearing in which the guilt or innocence of the accused is adjudicated." *Calandra*, 414 U.S. at 343. Indeed, as a result of both the grand jury's institutional independence from the other branches of government and the special procedural rules governing grand jury practice, the grand jury hears a much different story than that which the petit jury hears at trial. It cannot therefore be assumed that the evidence presented to a petit jury was the same as, over even substantially similar to, that presented to the grand jury. *Neder* is therefore wholly inapposite.

### C. If Insufficient Indictments May Be Cured By A Subsequent Petit Jury Verdict, Such Constitutional Violations Will Always Be Deemed Harmless.

By definition, harmless-error review occurs only at the appellate level. Therefore, if the trial judge erroneously

denies a defendant's objection to an insufficient indictment, this constitutional error will only reach an appellate court if the defendant has been convicted of the crime. Petitioner suggests that a constitutional grand jury error "is harmless where the petit jury subsequently is properly instructed and finds that the element in question has been proved beyond a reasonable doubt." Pet. Br. 36. Under this rule, subjecting an individual to criminal prosecution based upon a facially invalid indictment will *always* be considered harmless on review. That is, because the defendant in every case will have been convicted by the time a court applies harmless-error analysis, the petit jury's findings will have "cured" the grand jury's omission in every case. This result necessarily "robs the Fifth Amendment of much of its protective value to the private citizen." *Costello*, 350 U.S. at 364 (Burton, J., concurring), and is incompatible with this Court's holdings in *Russell*, 369 U.S. at 772 (omission of an essential fact from an indictment is reversible per se), and *Stirone*, 361 U.S. at 219 (constructive amendment of the indictment without the grand jury is reversible per se).

## IV. PETITIONER'S POLICY CONSIDERATIONS ARE BOTH MISPLACED AND INCONSISTENT WITH THE LAW.

### A. Rather Than Granting Respondent A Windfall, Holding That The Error Is Structural Will Ensure That Windfalls Are Avoided.

Petitioner suggests that holding that the omission of an essential element of the indictment is structural error "would effectively grant defendants a windfall." Pet. Br. 9. Petitioner ignores the reality that the error here (and in all such cases) could have been corrected by the prosecutions prompt return to the grand jury to seek a sufficient indictment, see *Crist* v. *Bretz*, 437 U.S. 28, 37, 38 n.15 (1978), or by greater vigilance on the part of the district court.

Respondent's supposed "windfall" in this case is the direct result of the prosecution's intransigence with respect to the sufficiency of its indictment and the district court's refusal to grant Respondent's timely motion. Both events occurred against the backdrop of binding circuit precedent clearly establishing the requirement for charging an overt act, *Gracidas-Ulibarry*, 231 F.3d at 1196, as well as circuit precedent holding that an omission of an overt act from an indictment on this charge is structural error. *United States* v. *Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999). Throughout the lower court proceedings, the prosecution persistently argued that the indictment was sufficient, see Brief for Appellee at 9-10, *United States* v. *Resendiz-Ponce*, 425 F.3d 729 (9th Cir. 2005) (No. 04-10302), and refused to offer additional information regarding the overt act it intended to prove at trial, despite Respondent's repeated efforts to force the prosecution to do so. JA 20. Respondent's efforts validate his contention that this information was vital to the defense of his case.[12] It was not until Petitioner sought Certiorari to this Court that it abandoned its argument that the indictment was sufficient. See Pet. for Cert. 9 n.3 (explaining that Petitioner does not seek review of the Ninth Circuit's holding that the indictment failed to allege an overt act).

### B. Petitioner's Position Removes Any Incentive For The District Court's To Rule Upon Pre-Trial Motions To Dismiss An Indictment.

Petitioner's position fails to account for the perverse incentives that would follow if the Court were to apply harmless error analysis here. Unless the Court deems the error structural, trial judges would have no motivation to rule

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[12] Here, the record contradicts Petitioner's assertion that Respondent "made no effort before trial to determine the specific 'overt act' on which the government intended to rely (*e.g.*, by filing a motion for a bill of particulars)." Pet. Br. 27. But even setting Respondent's repeated objections aside, "it is a settled rule that a bill of particulars cannot save an invalid indictment." *Russell*, 369 U.S. at 770.

on pre-trial motions to dismiss the indictment. Rather, logic suggests that judges would simply permit all such cases to proceed to trial. If the petit jury convicts the defendant, the subsequent conviction would "substitute" the grand jury's hypothetical determination of probable cause under the government's proposed harmless error regime. Cf. *Neder*, 527 U.S. at 38-39 (Scalia, J., dissenting) (asserting that "confirming" speculation does not disturb the allocation of power between the judge and the jury, but that "substituting" speculation does). If the petit jury instead acquits the defendant, the verdict would moot the significance of the pre-trial motion. And because trial judges would not have an incentive to dismiss constitutionally defective indictments, defendants in turn would not have an incentive to raise such motions.

Conversely, a structural error holding here will preserve the integrity of the grand jury's function in legitimizing charges and subsequent trials. While all defendants are presumed to be innocent, the reality is that a petit juror may be influenced by a grand jury's determination of probable cause. Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence* 3 Va. J. Soc'y Pol'y & L. 67, 122 (1995). Particularly in complicated trials, the jury may assume that "'there must be something to the charges,'" otherwise the grand jury would not have returned the indictment. *Id.* In the words of the former Chief Judge of New York, the public "assumes that where there is smoke in the form of an indictment, there is fire in the form of guilt." Sol Wachtler, *Grand Juries: Wasteful and Pointless*, N.Y. Times, Jan. 6, 1990, sec. 1 at 25. Although a petit jury is always susceptible to such an assumption, the consequences are especially profound in the event of a defective indictment, particularly if a grand jury would not have found that there was probable cause to support omitted essential element. In such a case, the entire trial proceeds on the basis of charges that should not have been brought without the consent of the grand jury

finding to which a defendant is constitutionally entitled. In effect, the petit jurors are inclined "giv[e] credence to a process void of the substantive content attributed to it." Brenner, *supra*, at 122-23.

In the event that a petit jury is not prejudiced by a defective indictment and declines to convict a defendant at trial, the ramifications may still be severe. See, *e.g.*, *Williams*, 504 U.S. 36 at 63 (Stevens, J., dissenting) ("'[W]hile in theory a trial provides the defendant with a full opportunity to contest and disprove charges against him, in practice, the handing up of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo.'"); *United States* v. *Serubo*, 604 F.2d 807, 817 (3d. Cir. 1979); and Andrew D. Leipold, *Why Grand Juries Do Not (And Cannot) Protect The Accused*, 80 Cornell L. Rev. 260, 268 (1995) ("In the public's mind an indictment often carries a presumption of guilt; it can cause economic harm and damage to [one's] reputation even if the defendant is later acquitted at trial."). The accused may suffer disastrous effects from which he may never recover—even if acquitted. See, *e.g.*, Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 Nw. U. L. Rev. 1297, 1299 (2000) (arguing that even if the defendant is acquitted or the charges are dismissed, "the sequella of an indictment may leave the defendant's reputation, personal relationships, and ability to earn a living so badly damaged that he may never be able to return to the life he knew before being accused"). "[D]ismissal of an indictment may be virtually the only effective way" to ensure that defendants are protected from "abuse of the grand jury process." *Serubo*, 604 F.2d at 817.

### C. Petitioner's Position Is Inconsistent With Fed. R. Crim. P. 52.

By enacting Rule 52, Congress established two distinct approaches for addressing preserved and waived errors in order to encourage defendants to raise objections timely, and to prevent windfalls. See *Olano*, 507 U.S. at 744 ("It is this

distinction between automatic and discretionary reversal that gives practical effect to the difference between harmless error and plain-error review, and also every incentive to the defendant to raise objections at the trial level."). Applying harmless error analysis to the error here would frustrate the purpose of Rule 52 by eviscerating this distinction. Petitioner's contention that "'there is no simple way ... to restore the defendant to the position in which he would have been had the indictment been dismissed before trial,'" Pet. Br. 37, only bolsters Respondent's position. Holding that the error is structural will allow future defendants avoid the "'inconvenience, expense, and opprobrium'" caused by a trial on a fatally flawed indictment. *Id.* Such a determination will encourage prosecutors to take care in drafting indictments, defendants to raise errors in timely fashion where they occur, and judges to dismiss facially invalid indictments so that the prosecution may correct errors before expending government resources on a trial.

## CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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No. 05-998

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*,
v.
JUAN RESENDIZ-PONCE, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## BRIEF OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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## INTEREST OF *AMICUS CURIAE*[1]

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance representation provided under the Criminal Justice Act (CJA), 18 U.S.C. § 3006A, and the Sixth Amendment to the Constitution. NAFD is a nationwide, nonprofit, volunteer organization whose membership includes attorneys employed by federal public and community defender organizations authorized under the CJA. NAFD promotes fair adjudication by appearing as *amicus curiae* in criminal-law matters, particularly those affecting indigent defendants. NAFD has appeared as *amicus curiae* in a number of recent cases before this Court.

NAFD files this brief because the Fifth Amendment's grand jury right is a central constitutional protection and the Solicitor General's position that an insufficient indictment should be subject to harmless error review demeans the grand jury's historic role and reduces that body's independence from the Executive and the Judiciary.

The parties have consented to the filing of the instant brief of *Amicus Curiae* on behalf of the Respondent. Their letters of consent were submitted with the brief.

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[1] No counsel for a party authored any part of this brief. S. Ct. Rule 37.6. No person or entity other than *Amicus Curiae* made a monetary contribution to the preparation or submission of the brief.

## SUMMARY OF ARGUMENT

The denial of the Fifth Amendment right to indictment by a grand jury is a structural error. The indictment at issue in this case is constitutionally deficient: it fails to state an offense. This Court has long held that such an indictment is subject to automatic reversal.

The Court's automatic reversal cases vindicate the independence of the grand jurors and the discretion vested in them. *Stirone v. United States*, 361 U.S. 212 (1960), *Russell v. United States*, 369 U.S. 749 (1962), and *Vasquez v. Hillery*, 474 U.S. 254 (1986), hold that courts may not substitute their own judgment for that of the grand jurors; no court can replicate their discretionary review. That discretion extends to framing the charges, and even to the question of whether any charge should be filed at all.

The error here – the failure to submit all of the elements of the offense to the grand jury – directly implicates the grand jury's screening function. When the government fails to submit all of the elements, that omission affects the grand jurors' assessment of the case by removing (at least) one element – and the facts underlying it – from their consideration. The failure to submit all of the elements also implicates the grand jurors' self-directed investigative function. In order to perform a harmless error analysis, a court would have to both substitute its assessment of the missing elements (forbidden by *Stirone* and *Russell*) and speculate as to what investigative activities the grand jury may have undertaken and what the results of that investigation might have been. Because courts cannot reliably engage in these speculative inquiries, the error is structural.

The Court may avoid these difficult constitutional questions. Fed. R. Crim. P. 34(a)(1) provides that "the court must arrest judgment if . . . the indictment or information does not charge an offense." This mandatory language demonstrates that Congress did not intend application of harmless error analysis to this fundamental defect.

## ARGUMENT

### BECAUSE THE EFFECT OF THE FAILURE TO PRESENT ALL OFFENSE ELEMENTS TO A GRAND JURY CANNOT BE RELIABLY ASSESSED, SUCH ERRORS ARE STRUCTURAL

#### A. Introduction.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." U.S. Const. amend. V. The Solicitor General concedes that an indictment not containing all the elements of the charged offense violates the Fifth Amendment. U.S. Br. at 9-10. The Court has held that the omission of an element from the indictment requires reversal because "[t]o allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure." *Russell*, 369 U.S. at 770; *accord Stirone*, 361 U.S. at 217. The Court refuses to make such a "guess" because the grand jury possesses broad discretion to charge a lesser offense, fewer offenses, or no offenses at all pursuant to its screening function. *Vasquez*, 474 U.S. at 263-64. The discretion identified in *Russell*, *Stirone*, and *Vasquez* precludes reliable

assessment of the effect of the government's failure to present all of the elements of an offense to the grand jury. Therefore, the error is structural. *See United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2564 n.4 (2006) ("rest[ing its] conclusion of structural error on the difficulty of assessing the effect of the error") (citations omitted).

The Court may avoid these constitutional issues by recognizing that under Fed. R. Crim. P. 34, an indictment that fails to state an offense is not subject to harmless error review: "[u]pon the defendant's motion or on its own, the court *must* arrest judgment if . . . the indictment or information does not charge an offense." Fed. R. Crim. P. 34(a)(1) (emphasis added). Rule 34 must be read *in pari materia* with Fed. R. Crim. P. 52(a). *Hamling v. United States*, 418 U.S. 87, 134-35 (1974). Because Rule 34 contains mandatory language, Rule 52(a) cannot be read to require a harmless error analysis as to such an error. The Court should avoid the constitutional questions by finding that in Rule 34 Congress determined that an indictment's failure to state an offense is a structural error. *See Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944).

### B. *Stirone* and *Russell* Hold That an Indictment That Omits a Theory of Liability or Fails to State an Offense Requires Automatic Reversal Because a Reviewing Court Cannot Substitute Its Judgment for That of the Grand Jury.

In *Stirone*, 361 U.S. 212, and *Russell*, 369 U.S. 749, the Court applied an automatic reversal rule to errors that, like the error here, went directly to the grand jury's screening

function.[2] In *Stirone*, the defendant was charged, in an indictment, with interfering with shipments of sand by William Rider into Pennsylvania. 361 U.S. at 213. The sand was "to be used for the erection of a steel-processing plant at Allenport, Pennsylvania." *Id.*

> The district judge, over petitioner's objection as to its materiality and relevancy, permitted the Government to offer evidence of an effect on interstate commerce not only in sand brought into Pennsylvania from other States but also in interference with steel shipments from the steel plant in Pennsylvania into Michigan and Kentucky.

*Id.* at 214. The latter theory was not charged in the indictment; the former was. *Id.* at 217.

The Court held that the district court erred in permitting the petit jury to consider the theory of liability that the defendant interfered with steel shipments from the steel

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[2] In *United States v. Cotton*, 535 U.S. 625 (2002), the Court noted that *Russell* and *Stirone* rejected application of harmless error analysis to preserved indictment error, stating that "[w]e need not retreat from this settled proposition of law." *See id.* at 631. *Cotton* rejected the notion that a defective indictment was a jurisdictional defect. *See id.* (overruling *Ex parte Bain*, 121 U.S. 1 (1887)). Although both cite *Bain*, neither *Russell* nor *Stirone* relies upon *Bain*'s jurisdictional analysis, and *Cotton* therefore does not undermine them.

Nor does *Cotton*'s holding that the omission of a sentencing "element" from the indictment is reviewable for plain error undermine Respondent's argument that the omission of an element from the indictment is structural error. *See Johnson v. United States*, 520 U.S. 461, 466 (1997) (forfeited structural error is reviewed under the plain error standard).

plant in Pennsylvania into Michigan and Kentucky: "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *See id.* (citations omitted). The Court observed that "it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned." *Id.* In other words, the Court was concerned that the petit jury may have convicted Stirone by finding that the government had proved, beyond a reasonable doubt, that he interfered with steel shipments from the steel plant in Pennsylvania into Michigan and Kentucky.

Even though the petit jury could have made that finding under the beyond-a-reasonable-doubt standard, the Court reversed because

> [t]he grand jury which found this indictment was satisfied to charge that Stirone's conduct interfered with interstate importation of sand. But neither this nor any other court can know that the grand jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of steel from a mill later to be built with Rider's concrete.

*Id.* Because the petit jury could have found Stirone guilty under the theory of interference with the exportation of steel beyond a reasonable doubt, a reviewing court could certainly "know" whether a grand jury would have found probable cause as to that theory: it would have. But *Stirone* recognized that probable cause was not the sole issue; the question was, would the grand jury "have been willing to charge" that theory. By recognizing that no court could know what the grand jury would be willing to

charge, *Stirone* established that the grand jury possessed, in fulfilling its screening function, discretion that defied judicial review.

*Russell* adopted the same approach. There, the indictment was insufficient for failure to allege an offense element: the subject under inquiry by a congressional committee at the time of the defendant's refusal to answer questions. 369 U.S. at 753-55. By requiring a grand jury indictment, "Congress made the basic decision that only a grand jury could determine whether a person should be held to answer in a criminal trial for refusing to give testimony pertinent to a question under congressional committee inquiry." *Id.* at 770. *Russell* held that the grand jury's prerogative could not be usurped by the other participants in the criminal justice system, the Executive and the Judiciary, because "[t]o allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of [his Fifth Amendment rights]." *Id.* If the grand jury's function is merely to determine probable cause, *Russell*'s reluctance "to make a subsequent guess as to what was in the minds of the grand jury," *id.*, makes little sense; a court would be even more skilled in assessing probable cause than the grand jury. Rather, *Russell* vindicated the grand jury's broad discretion in performing its screening function.

### C. *Vasquez* Confirms That the Grand Jury Possesses Broad Discretion to Frame the Charges in an Indictment, Discretion That Cannot Be Replicated by a Court Performing a Harmless-Error Analysis.

#### 1. *Vasquez* Vindicates the Understanding of the Grand Jury That Animated *Stirone* and *Russell.*

The Court built upon the analytical basis for its decisions in *Stirone* and *Russell* through its explication of the extent of the grand jury's discretion in *Vasquez v Hillery*:

> The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a non-capital offense – all on the basis of the same facts. Moreover, "[t]he grand jury is not bound to indict in every case where a conviction can be obtained."

474 U.S. 254, 263 (1986) (quoting *United States v. Ciambrone*, 601 F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting)); *accord Campbell v. Louisiana*, 523 U.S. 392, 399 (1998) (The grand jury "controls not only the initial decision to indict, but also significant decisions such as how many counts to charge and whether to charge a greater or lesser offense, including the important decision whether to charge a capital crime."). Thus, "even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that

confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come." *Id.*[3] *Vasquez* rejects the Solicitor General's contention that "the role of the grand jury is to indict whenever there is probable cause to believe that the accused committed the charged crime." U.S. Br. at 28.

Nor is there merit in the Solicitor General's suggestion, *id.* at 20, that *Vasquez*'s understanding of the grand jury's role is somehow limited to the context of racial discrimination: the Court's unwillingness to second-guess the grand jury's judgment in *Russell* and *Stirone* was based on the grand jury's broad discretion. *Stirone*, like *Vasquez*, recognized that probable cause was not the sole issue; the question was, would the grand jury "have been willing to charge" an additional theory. *See Stirone*, 361 U.S. at 217. By recognizing that no court could know what the grand jury would be willing to charge, *Stirone* anticipated *Vasquez*'s later holding that "[t]he grand jury is not bound to indict in every case where a conviction can be obtained." *See Vasquez*, 474 U.S. at 263.[4]

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[3] Justice Blackmun has identified an example of a grand jury's traditional discretion, stating that "it is conceivable that a properly instructed Kentucky grand jury, in response [to the very severe penalties associated with a habitual offender statute], would have refused to subject petitioner to such an onerous penalty for his forgery charge" even though there was sufficient evidence. *Bordenkircher v. Hayes*, 434 U.S. 357, 368 n.2 (1978) (Blackmun, J., dissenting).

[4] In *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), the Court observed that "[t]he nature of the violation [in cases such

(continued...)

*Russell* also anticipated *Vasquez*. There, the Court's refusal "to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment," 369 U.S. at 770, fits comfortably within the *Vasquez* paradigm. The Court's reluctance to make a "guess" as to how the grand jury would have exercised its discretion is a consequence of the courts' inability to interfere with charging decisions.

**2. The Lower Courts Support *Vasquez*'s Description of the Scope of the Grand Jury's Discretion.**

Although the lower courts have not often considered the scope of the grand jury's prerogatives, a number of opinions endorse *Vasquez*'s conception of the grand jury. *See, e.g.*, *United States v. Navarro-Vargas*, 408 F.3d 1184, 1200 (9th Cir.) (en banc) (*Navarro-Vargas II*), *cert. denied*, 126 S. Ct. 736 (2005); *id.* at 1211-12 (Hawkins, J., dissenting); *United States v. Navarro-Vargas*, 367 F.3d 896, 899 (9th Cir. 2004) (Kozinski, J., dissenting)

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[4] (...continued)
as *Vasquez*] allowed a presumption that the defendant was prejudiced, and any inquiry into harmless error would have been unguided speculation." *Id.* at 257. If the grand jury's function is solely to determine probable cause, there is no reason to believe that the "inquiry into harmless error would have been unguided speculation," *id.*, because the analysis of whether there is probable cause after a jury verdict under the beyond-a-reasonable-doubt standard is not the least bit complex; there would always be probable cause. *See United States v. Mechanik*, 475 U.S. 66, 70 (1986) ("[T]he petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt.").

(*Navarro-Vargas I*); *Gaither v. United States*, 413 F.2d 1061, 1066 & n.6 (D.C. Cir. 1969); *United States v. Cox*, 342 F.2d 167, 189-90 (5th Cir. 1965) (Wisdom, J., concurring); *Natwig v. Webster*, 562 F. Supp. 225, 230 n.2 (D.R.I. 1983); *United States v. Asdrubal-Herrera*, 470 F. Supp. 939, 942 (N.D. Ill. 1979); *Application of Jordan*, 439 F. Supp. 199, 202-04 & n.5 (S.D.W.V. 1977); *In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives*, 370 F. Supp. 1219, 1222 (D.D.C. 1974).[5]

The grand jury's freedom to decline to return an indictment even in a "case where a conviction can be obtained," *Vasquez*, 474 U.S. at 263, is fundamental to its role as a protector of the people from the power of the Executive.

> By refusing to indict, the grand jury has the unchallengeable power to defend the innocent from

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[5] Numerous commentators agree with *Vasquez*'s conception of the grand jury. *See* Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 Geo. L.J. 1265, 1299-1309 (2006); K. Brent Tomer, *Ring Around the Grand Jury: Informing Grand Jurors of the Capital Consequences of Aggravating Facts*, 17 Cap. Def. J. 61, 76 (2004); Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. Rev. 1, 2 (2002); Andrew Horwitz, *Taking the Cop Out of Copping a Plea: Eradicating Police Prosecution*, 40 Ariz. L. Rev. 1305, 1361-62 (1998); 1 Sara S. Beale et al., *Grand Jury Law and Practice* § 1:6, at 1-32 (2d ed. 1997); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1183-84 (1991); *see also* George D. Edwards, *The Grand Jury* 35-36 (1906) (describing grand juries rejecting cases in which there was probable cause because the grand jury viewed the offenses as not serious enough to merit prosecution).

> government oppression by unjust prosecution. And it has the equally unchallengeable power to shield the guilty, should the whims of the jurors or their conscious or subconscious response to community pressures induce twelve or more jurors to give sanctuary to the guilty.

*Cox*, 342 F.2d at 189-90 (Wisdom, J., concurring). The grand jury thus acts as the "conscience of the community," *Gaither*, 413 F.2d at 1066 & n.6, in determining, on a normative basis, whether a prosecution *should* go forward. "That a grand jury may *legitimately* perform a quasi-equitable function is implicit in its role as 'an irresponsible utterance of the community at large, answerable only to the general body of citizens, from whom they come at random, and with whom they are at once merged.'" *United States v. Ciambrone*, 601 F.2d 616, 629 n.2 (2d Cir. 1979) (Friendly, J., dissenting) (quoting *In re Kittle*, 180 F. 946, 947 (S.D.N.Y. 1910) (L. Hand, J.)) (emphasis added). Therefore, as the Court has recognized, the grand jury has the authority to refuse to authorize a prosecution that it believes, for whatever reason, is unwarranted. *Vasquez*, 474 U.S. at 263.

The discretion exercised by the grand jury is thus analogous to that vested in the prosecutor. *See Navarro-Vargas I*, 367 F.3d at 900 (Kozinski, J., dissenting) (the grand jury's function "is most accurately described as prosecutorial");[6] *accord Navarro-Vargas II*, 408 F.3d

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[6] *See also Navarro-Vargas I*, 367 F.3d at 900 (Kozinski, J., dissenting) ("There's no reason grand juries cannot or should not make . . . political judgments [as prosecutors do] about which laws deserve vigorous enforcement and which ones do not, in deciding (continued...)

at 1200 ("'[T]he public prosecutor, in deciding whether a particular prosecution shall be instituted or followed up, performs much the same function as a grand jury.'") (quoting *Butz v. Economou*, 438 U.S. 478, 510 (1978)); *id.* at 1213 (Hawkins, J., dissenting). As one commentator has observed, "[i]t is because the grand jury serves accusatory and investigative functions that a prosecutorial analogy is more apt." Kuckes, 94 Geo. L.J. at 1286. It is well-settled that the prosecutorial charging function is outside judicial supervision. *See generally United States v. Jacobo-Zavala*, 241 F.3d 1009, 1014 (8th Cir. 2001) (United States Attorney's decision to dismiss charges because the penalties were too severe was not subject to judicial review). By conducting a harmless error analysis as to the grand jury's decision to charge an offense that was never properly presented to it, a court would intrude upon an effectively unreviewable discretionary decision.

### 3. The Court Should Reject the Solicitor General's Attempt to Eviscerate *Vasquez*.

#### a. *Vasquez* Affirms Constitutionally-Mandated Discretion, Not "Nullification."

The Solicitor General incorrectly demeans the discretion described in *Vasquez* as an unreviewable – and illegitimate – power to "nullify" an otherwise valid

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[6] (...continued)
whom to indict, and on what charges."); Kuckes, 94 Geo. L.J. at 1307 ("[B]y viewing the indicting grand jury as a democratic force within the prosecutorial function, the grand jury's 'shield' and 'sword' functions are not distinct and competing functions, but part of the same integrated role – the exercise of discretionary authority to approve or decline criminal prosecutions.").

prosecution. U.S. Br. at 31-33.[7] But when a prosecutor chooses not to prosecute a case, that is not nullification; it is an exercise of prosecutorial discretion. Because the grand jury's "function . . . is most accurately described as prosecutorial," *see Navarro-Vargas I*, 367 F.3d at 900 (Kozinski, J., dissenting), its decision not to approve a prosecution for which probable cause exists is no more nullification than a similar decision made by a prosecutor.

*Vasquez* held that one of the reasons why racial discrimination in grand jury selection is so prejudicial – even after a petit jury conviction – is that the grand jury enjoys broad discretion in choosing what to charge and whether to charge at all, even in a case where there is not only probable cause, but proof beyond a reasonable doubt. *See* 474 U.S. at 263. If a grand jury's discretion not to charge an offense, or to charge a lesser offense, was not a *legitimate* grand jury function, then *Vasquez* could not have relied upon that attribute in determining whether the error in that case merited reversal.[8]

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[7] The term "nullify" is a misnomer. Even if a grand jury refused to indict, jeopardy does not attach. *See United States v. Williams*, 504 U.S. 36, 49 (1992).

[8] The Solicitor General's arguments echo those made in dissent in *Vasquez*. *See* 474 U.S. at 277 (Powell, J., dissenting) (objecting to the majority's reliance on the grand jury's discretion not to indict even if probable cause is established and arguing that "[a] defendant has no right to a grand jury that errs in his favor"). The grand jury's exercise of its discretion not to return an indictment is no more error than the prosecutor's discretionary decision not to seek an indictment or, in the case of a presentment, not to follow the grand jury's lead. *See United States v. Cox*, 342 F.2d 167 (5th Cir. 1965) (prosecutor declined to prosecute a charge made by a grand jury).

### b. *Vasquez*'s Explication of the Grand Jury's Role Was Not *Dicta*.

Recognizing that his view of the grand jury contradicts *Vasquez*, the Solicitor General erroneously claims that the Court's explication of the grand jury's historic role was *dicta*. U.S. Br. at 20. "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996) (citations omitted). "'As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.'" *Id.* (citation omitted).

*Vasquez* decided whether the Court would apply a harmless error analysis to the racial discrimination that infected the selection of the grand jury that indicted Hillery. *See* 474 U.S. at 260. While the grand jury was tainted by discrimination, the indictment was adjudicated by an untainted petit jury. The state argued that Hillery's "conviction after a fair trial . . . purged any taint attributable to the indictment process." *Id.*

The Court's precedents did not support the state's position, *id.* at 261-62 (citation omitted), but *Vasquez* entertained the state's contention that those precedents should be overruled. The state argued "that requiring the State to retry a defendant, sometimes years later, imposes on it an unduly harsh penalty for a constitutional defect bearing no relation to the fundamental fairness of the trial." *Id.* at 262. *Vasquez* rejected the contention that the penalty was unduly harsh: retrial was not disproportionate to the

"grave constitutional trespass" of "intentional discrimination in the selection of grand jurors." *Id.*

As to the fundamental fairness contention, the Court explained why it was not "persuaded that discrimination in the grand jury has no effect on the fairness of the criminal trials that result from that grand jury's actions." *Id.* at 263. The State's harmless error argument was that a conviction based upon proof beyond a reasonable doubt necessarily resolves the question of whether there was probable cause. Assuming that the grand jury's sole responsibility is to determine probable cause, an indictment returned by the most racially biased grand jury in the world could always be cured by the return of a guilty verdict by an unbiased petit jury under the reasonable doubt standard.

*Vasquez* disagreed, reasoning that the grand jury's powers are much more expansive: it need not indict at all, even where a conviction can be had, and it may choose to charge lesser or fewer offenses. 474 U.S. at 263. Harmless error analysis was impossible: "even if a grand jury's determination of probable cause is confirmed by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come." *Id.* *Vasquez* thus found that the error was structural because racial discrimination was pernicious *and* because the grand jury's broad discretion prevents a reviewing court from ever knowing whether an unbiased and properly constituted grand jury would have exercised its discretion differently: "we simply cannot know that *the need to indict* would have been assessed in the same way by a grand jury properly constituted." *Id.* at 264 (emphasis added). *Vasquez*'s grand jury analysis is binding because

it is necessary to the decision *and* part of an "explication[] of the governing rules of law." *Seminole Tribe*, 517 U.S. at 67.

The dissenters recognized that the majority's discussion of the attributes of the grand jury was part of the *Vasquez* holding:

> The Court nevertheless decides that discrimination in the selection of the grand jury potentially harmed respondent, because the grand jury is vested with broad discretion in deciding whether to indict and in framing the charges, and because it is impossible to know whether this discretion would have been exercised differently by a properly selected grand jury.

474 U.S. at 275 (Powell, J., dissenting).

The Solicitor General argues that *United States v. Mechanik* "concluded that the considerations on which *Vasquez* was based 'have little force outside the context of racial discrimination in the composition of the grand jury.'" U.S. Br. at 20 (quoting 475 U.S. 66, 71 n.1 (1986)). While the *Mechanik* footnote correctly asserts that *Vasquez* rested on "precedent directly applicable to the special problem of racial discrimination," and that "racial discrimination in the selection of grand jurors is so pernicious, and other remedies so impractical, that the remedy of automatic reversal was necessary as a prophylactic means of deterring grand jury discrimination in the future," 475 U.S. at 71 n.1, the cited passage from *Mechanik* does not purport to describe the entirety of the *Vasquez* analysis. In fact, the Court in *Vasquez* was asked to overrule the directly applicable precedent mentioned in *Mechanik*, and it declined to do so based on its conception

of the full range of the grand jury's discretion. Thus, *Vasquez* held, and *Mechanik* did not question, that mandatory reversal was required because of both the discrimination *and* the grand jury's discretion to determine "the nature or very existence of the proceedings." *See Vasquez*, 474 U.S. at 263.[9]

Moreover, twelve years after *Mechanik*, *Campbell v. Louisiana* reaffirmed *Vasquez*'s description of the grand jury's powers: the grand jury "controls not only the initial decision to indict, but also significant questions such as how many counts to charge and whether to charge a greater or lesser offense, including the important decision whether to charge a capital crime." 523 U.S. 392, 399 (1998) (citing *Vasquez*, 474 U.S. at 263).

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[9] The Solicitor General misreads *Bank of Nova Scotia v. United States*, when he claims it "characterized *Vasquez* as involving an 'isolated exception[]' to the harmless-error rule." U.S. Br. at 20 (quoting 487 U.S. 250, 256 (1988)). Actually, the Court stated "cases [such as *Vasquez*] *may* be explained as isolated exceptions to the harmless-error rule." 487 U.S. at 256 (emphasis added). The Court rejected that explanation in favor of "an alternative and more clear explanation . . . that [the cases exemplified by *Vasquez*] are ones in which the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice." *Id.* at 256-57. *Vasquez* explained that the reason why "the structural protections of the grand jury have been so compromised" was that no one could know how a properly selected grand jury would have exercised its broad, quasi-prosecutorial discretion in evaluating "the need to indict." *Vasquez*, 474 U.S. at 264.

### c. The Historical Record Demonstrates That the Framers Likely Shared *Vasquez*'s Conception of the Grand Jury.

"There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor." *Costello v. United States*, 350 U.S. 359, 362 (1956). "Undoubtedly the framers of the [Fifth Amendment] had for a long time been absorbed in considering the arbitrary encroachments of the crown on the liberty of the subject, and were imbued with the common-law estimate of the value of the grand jury as part of its system of criminal jurisprudence." *Ex parte Bain*, 121 U.S. 1, 12 (1887).

Historical evidence of the institution's development in both England and this country's colonial period demonstrates that the grand jury's role in providing protection to the people from the Executive by acting as the "conscience of the community," *Gaither v. United States*, 413 F.2d 1061, 1066 n.6 (D.C. Cir. 1969), was a significant component of "the common-law estimate of the value of the grand jury," *Bain*, 121 U.S. at 12, as an important guarantor of personal freedoms. *See generally* Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 Cornell L. Rev. 260, 308 (1995).

The Framers certainly would have been aware of the celebrated case of an English grand jury resisting the Crown in 1681 with respect to the Earl of Shaftesbury and Stephen Colledge. *See id.* at 281-82, 308. In both of those cases, the grand jury withstood significant pressure from the courts and the Crown, and refused to indict Shaftesbury and Colledge on charges that were politically motivated.

*Id.* at 281-82. This refusal was perceived as a "turning point in the relationship between grand jury and government." *Id.* at 281; *accord* 1 Sara S. Beale et al., *Grand Jury Law and Practice* § 1:2, at 1-10 (2d ed. 1997).

The tradition begun in the Shaftesbury and Colledge cases continued in colonial America. In 1734, in the case of John Peter Zenger, grand juries refused to indict Zenger on seditious libel charges despite strong evidence of guilt. *See United States v. Navarro-Vargas*, 408 F.3d 1184, 1192 (9th Cir.) (en banc) (*Navarro-Vargas II*), *cert. denied*, 126 S. Ct. 736 (2005); *see also* 4 Wayne LaFave et al., *Criminal Procedure* § 15.3(c) (2d ed. 1999) (observing that "most of the celebrated instances of grand jury refusals to indict involved cases in which the evidence was sufficient, but the grand jury simply refused to permit an unjust prosecution"). Similarly, during the Revolutionary War, grand juries frequently refused to indict in tax collection cases in which merchants were accused of avoiding import and export payments. Leipold, 80 Cornell L. Rev. at 285. "The Revolutionary War experience helped lay the groundwork for the inclusion of the grand jury guarantee in the Fifth Amendment." *Id.*

There is little doubt that when the Fifth Amendment was adopted, the Framers were well acquainted with the full scope of the grand jury's protective power. *See* Richard D. Younger, *The People's Panel: The Grand Jury in the United States, 1634-1941*, at 25-30, 33-34 (1963); *accord Navarro-Vargas II*, 408 F.3d at 1198-99 (the grand jury institution reached the apex of its influence and utility in the pre-revolutionary colonial period); *Fields v. Soloff*, 920 F.2d 1114, 1117 (2d Cir. 1990) ("Just prior to the American Revolution, [grand juries] became vigilant in insulating from prosecution colonists who had violated

unpopular British laws."); Leroy D. Clark, *The Grand Jury: The Use and Abuse of Political Power* 17-18 (1975). It is extremely likely, based on the colonial experience, that the protective powers set forth in *Vasquez* were perceived by the Framers as valued attributes. *See* Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 Geo. L.J. 1265, 1302 (2006) (the grand jury's discretion not to indict was "'arguably . . . the most important attribute of grand jury review from the perspective of those who insisted that a grand jury clause be included in the Bill of Rights'") (quoting LaFave et al., *Criminal Procedure* § 15.2(g)). Because in interpreting the Fifth Amendment the Court must "place [itself] as nearly as possible in the condition of the men who framed that instrument," *Bain*, 121 U.S. at 12, the Court should reaffirm *Vasquez*.

Although the post-revolutionary period instructions cited by the Solicitor General do instruct grand jurors of a supposed duty to indict, U.S. Br. at 31 n.10,[10] those instructions are merely the views of individual jurists; they are not precedent, unlike *Stirone*, *Russell* and *Vasquez*. Moreover, that members of the judiciary have sought to impose on the grand jurors their views of the jurors' duties is certainly not dispositive;[11] the grand jury was envisioned

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[10] *But see* 2 *The Documentary History of the Supreme Court of the United States, 1789-1800: The Justices on Circuit: 1790-1794*, at 183 (Maeva Marcus ed., 1990) (grand jury charge of Justice Wilson, May 23, 1791) (advising grand jurors of the available penalties).

[11] Occasionally, such instructions have contained a political component. *See generally* Ralph Lerner, *The Supreme Court as*

(continued...)

as an independent body by the Framers: it "belongs to no branch of government, but is a 'constitutional fixture in its own right.'" *Navarro-Vargas II*, 408 F.3d at 1199 (quoting *United States v. Williams*, 504 U.S. 36, 47-50 (1992)). Judicial instructions could no more cabin the grand jurors' discretion than could the King force them to indict Shaftesbury and Colledge. *See id.* at 1200 ("The grand jury's discretion – its independence – lies in two important characteristics: the absolute secrecy surrounding its deliberations and vote and the unreviewability of its decisions."). To the extent that the non-precedential charges cited by the Solicitor General are persuasive at all, they promote a view of the grand jury that conflicts with that taken by the Court in *Stirone*, *Russell*, *Vasquez* and *Campbell*, and that which the Framers likely held.

### D. *Bank of Nova Scotia* and *Mechanik* Are Inapposite Because They Involved Non-Constitutional Errors, Not the Grand Jury's Screening Function.

While a constitutionally deficient indictment that fails to state an offense cannot be reviewed for harmless error, other grand jury errors continue to be subject to Fed. R. Crim. P. 52(a), as was the case in *Bank of Nova Scotia v. United States* and *United States v. Mechanik*. In *Bank of*

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[11] (...continued)
*Republican Schoolmaster*, 1967 Sup. Ct. Rev. 127, 131 ("The Justices were quick to see and seize the chance to proselytize for the new government and to inculcate habits and teachings most necessary in their view for the maintenance of self-government. (In so doing they left later interpreters with the problem of distinguishing a defense of the regime and the Constitution from a defense of an administration and of a party.)").

*Nova Scotia*, "no constitutional error occurred during the grand jury proceedings." 487 U.S. 250, 258 (1988); *see id.* (cataloguing violations of Fed. R. Crim. P. 6). In *Mechanik*, the Court assumed that the prosecutors had violated Fed. R. Crim. P. 6(d) by allowing more than one witness to be present before the grand jury at the same time. *See* 475 U.S. 66, 69 (1986). In those cases, the Court was not required to speculate as to how the grand jury would have exercised its discretion with respect to an element that was never presented to it. Therefore, the structural error argument urged here has no application to the errors in *Bank of Nova Scotia* and *Mechanik*.

**E. Because No Court Can Know What the Grand Jury Would Be Willing to Charge, the Omission of an Element From an Indictment Is a Structural Error, Despite the Solicitor General's Speculation That Some Such Errors May Aid the Defendant.**

In the event that the Court reaffirms its explication of the grand jury's prerogatives in *Stirone*, *Russell* and *Vasquez*, the Solicitor General argues that the error is not structural because he speculates that the omission of an element from the indictment "may actually increase the likelihood" of a grand jury's exercise of its discretion on behalf of the defendant "by jurors who believe that the remaining elements should not constitute an offense." U.S. Br. at 34 (emphasis omitted). While that is a possibility, it is just as likely that the inclusion of an omitted element might lead the grand jury to decline to indict, particularly where that element substantially increases the potential penalty or even renders the defendant eligible for the death penalty *See Vasquez*, 474 U.S. at 263. Inclusion of an omitted element may prompt a grand jury to conclude that

the prosecutor has over-reached, such as when an attempt charge is accompanied by a particularly weak overt act. If evidence is offered regarding an omitted element, that evidence may cause the grand jury to question "the need to indict." *Id.* at 264.

But even in cases where there is no obvious benefit to the defendant in requiring consideration of all of the elements, the omission of an element[12] necessarily constricts the scope of the grand jury's inquiry. When the grand jury is presented with *all* of the elements, the scope of its inquiry is necessarily broadened; elements, after all, necessarily involve facts. A broadened inquiry, involving more facts, can affect the grand jury's assessment of a case in ways that a court cannot anticipate. *See, e.g.*, *Russell*, 369 U.S. at 770. Any broadening of the factual inquiry may bring to light previously unknown mitigating facts that may implicate the grand jury's quasi-prosecutorial discretion.

The inclusion of additional facts and elements may even prompt the grand jury to exercise its inherent investigative power, leading it to uncover still more facts that may affect its assessment of the case. *See United States v. Sells Engineering*, 463 U.S. 418, 423 (1983) (the grand jury "has always been extended extraordinary power of investigation and great responsibility for directing its own efforts . . . ."). The grand jury's capacity for *self-directed* investigation distinguishes *Neder v. United States*, 527 U.S. 1 (1999), where the Court applied harmless error

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[12] Although the example of a single omitted element is used here, there are no inherent limitations to the number of elements subject to the harmless-error rule that the Solicitor General proposes.

analysis to the omission of a single, uncontested element from the charge given to the petit jury. Petit juries have neither investigative capacity nor investigative responsibility. Therefore, the trial record adequately reflects what the trial jury was called upon to evaluate. Not so for the grand jury. Because it may perform self-directed investigations, no one can know what lines of investigation might have been pursued had the grand jury been asked to pass on every element of the offense; the record is incomplete. "Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2565 (2006).

The grand jury's ability to apply its community perspective to new facts and elements, and its potential to bring new facts to light by way of its self-directed investigations, "bear[] directly on the 'framework within which the [grand jury's screening function] proceeds.'" *Gonzalez-Lopez*, 126 S. Ct. at 2564-65 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)). The end result is similar to that in *Gonzalez-Lopez*. There, in analyzing the deprivation of the defendant's right to choice of counsel, the Court observed that "[i]t is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings." *Id.* at 2565. Here, we cannot know "what different choices [the grand jury] would have made" with respect to its screening or investigative functions had it been asked to evaluate all the elements, nor can "the impact of those different choices" be "quantif[ied]." *See id.* In short, facts provide context, context informs discretion, discretion affects results in ways that cannot be predicted.

Ultimately, "neither this nor any other court can know that the grand jury would have been willing to charge" an offense containing the omitted element. *Stirone*, 361 U.S. at 217.[13] These dueling speculations only make clear that the grand jury's broad discretion insulates its decisions from judicial review: the error is structural because of "the difficulty of assessing [its] effect." *Gonzalez-Lopez*, 126 S. Ct. at 2564 n.4.[14]

### F. An Indictment's Failure to State an Offense Is Structural Error Under Rule 34.

The Court has held that dismissal is the remedy for an indictment's failure to state an offense. *See, e.g., United States v. Carll*, 105 U.S. 611, 613 (1881). Rule 34 codified that remedy: "Upon the defendant's motion or on its own, the court *must* arrest judgment if . . . the indictment or

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[13] A defendant is denied his "substantial right to be tried only on charges presented in an indictment returned by a grand jury," *Stirone*, 361 U.S. at 217, when an element is omitted.

[14] The Solicitor General suggests that if grand jurors may exercise discretion akin to that of the prosecutor, "a similar conclusion would presumably be required concerning the omission of an offense element from the petit jury's instructions." U.S. Br. at 34. There is no merit in that suggestion. The institutional differences between the two types of juries have persisted without importing the characteristics of one into the other. For instance, prosecutors may withhold exculpatory evidence from the grand jury, *see United States v. Williams*, 504 U.S. 36 (1992), present unconstitutionally seized evidence, *see United States v. Calandra*, 414 U.S. 338 (1974), and offer only hearsay, *see Costello v. United States*, 350 U.S. 359 (1956). These characteristics of grand jury procedure have not been imported into petit jury practice. Nor will the grand jury's quasi-prosecutorial role.

information does not charge an offense." Fed. R. Crim. P. 34(a)(1) (emphasis added). The Solicitor General urges the Court to abandon its prior cases because it has applied harmless error analysis, pursuant to Fed. R. Crim. P. 52(a), to non-constitutional errors in *Bank of Nova Scotia*, 487 U.S. at 254-56, and *Mechanik*, 475 U.S. at 71-72. U.S. Br. at 17-19. These cases are not subject to Rule 34 because they do not involve an indictment's failure to state an offense.

Moreover, Rule 34(b) contemplates a motion made *after trial* – the precise situation under which the Solicitor General claims a harmless-error analysis is proper – and it requires district courts to arrest judgment if the indictment does not state an offense. Rule 34, like Rule 52(a), is "as binding as any statute duly enacted by Congress," *Bank of Nova Scotia*, 487 U.S. at 255, and its mandatory dismissal provision cannot be disregarded.

Rule 34 must be read *in pari materia* with Rule 52(a). *See Hamling v. United States*, 418 U.S. 87, 134-35 (1974). In *Hamling*, the defendant urged an automatic reversal rule for violation of Fed. R. Crim. P. 30(d)'s procedures for objections to jury instructions. The Court reasoned that "such an approach would be unduly mechanical, and would be inconsistent with interpretation *in pari materia* of Rule 30 and other relevant provisions of the Federal Rules of Criminal Procedure, since Rule 52(a) specifically provides that '(a)ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.'" 418 U.S. at 134-35. Rule 52(a)'s generic remedial provisions were applicable because nothing in Rule 30 said otherwise.

Rule 34(a)(1), in contrast, does contain a remedial provision – one that makes arrest of judgment mandatory. When that provision and Rule 52(a) are read *in pari materia*, it is clear that Rule 52(a)'s generic remedial provisions do not apply to the specific violation to which Rule 34 speaks, an indictment's failure to state an offense. Rule 34's adoption of a mandatory remedy is, in effect, a Congressional determination that the failure to state an offense *does* affect substantial rights and *cannot* be disregarded.

That specific determination should control here. Rule 34's direct application, post-trial, to an indictment that fails to state an offense dictates that Rule 34's remedy, not the general rule contained in Rule 52(a), applies here: "[a] specific provision controls over one of more general application." *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991) (citation omitted).

The Court reached a similar conclusion in *Zedner v. United States*, 126 S. Ct. 1976 (2006). There, the Solicitor General argued that Rule 52(a) should apply to motions to dismiss under the Speedy Trial Act. That act, 18 U.S.C. § 3162(a)(2), provides that in the event of a violation, "the information or indictment shall be dismissed on motion of the defendant." The Court rejected application of Rule 52(a), holding that "[t]he argument that the District Court's failure to make the prescribed findings may be excused as harmless error is hard to square with the Act's categorical terms." 126 S. Ct. at 1989-90 (citation omitted). The language of Rule 34 is no less categorical than that of § 3162(a)(2). *Compare* Fed. R. Crim. P. 34(a) ("the court must arrest judgment") *with* 18 U.S.C. § 3162(a)(2) ("the . . . indictment shall be dismissed").

Thus, Rule 52(a) is similarly inapplicable to Rule 34's mandatory rule.

Because Rules 34(a)(1) and 52(a), taken together, establish that an indictment's failure to state an offense affects substantial rights and cannot be disregarded, the fact that Respondent moved pre-trial for dismissal pursuant to Fed. R. Crim. P. 12(b)(2), *see* 2006 WL 1732858, at *10 (joint appendix), rather than Rule 34(a)(1), is of no moment. Both motions "essentially ask the same question: . . . whether the indictment is sufficient in all respects." *United States v. Wiggins*, 971 F. Supp. 660, 667 (N.D.N.Y. 1997) (citation omitted).[15] If Respondent's motion to dismiss the indictment was filed under Rule 34, Rule 52(a) would not apply, and reversal would be mandatory. Reading Rules 12, 34 and 52 together, the Rule 12 motion must be subject to the same standard in order to read the Rules as a coherent whole, as required by *Hamling*. *See* 418 U.S. at 134-35. Put another way, a system that employs two different standards of review to the same motion and penalizes a defendant with a worse standard for raising an issue *before* trial would be untenable. *See United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940) (the Court avoids interpreting statutes to achieve absurd results). The question of whether the error here is structural cannot turn on whether the motion to dismiss is predicated on Rule 12 rather than Rule 34. *See*

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[15] Like a Rule 12(b)(2) motion to dismiss, a motion to arrest judgment for failure to state an offense is based only on the indictment, not the facts adduced at trial. *See United States v. Esposito*, 492 F.2d 6, 9 (7th Cir. 1973) (citing *United States v. Sisson*, 399 U.S. 267 (1970)); *accord Guam v. Palomo*, 511 F.2d 255, 259 (9th Cir. 1975).

Fed. R. Crim. P. 2 (the Rules "are to be interpreted to provide for the just determination of every criminal proceeding, [and] to secure simplicity in procedure and fairness in administration . . . . "). Rule 12 was promulgated to eliminate complicated rules of pleading, *see* 1A Charles A. Wright et al., *Federal Practice and Procedure: Criminal 3d*, § 191, at 319-21 (1999), not to create them.

Rule 34 permits the Court to affirm without resolving whether the Fifth Amendment requires automatic reversal if an indictment fails to state an offense. *See Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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In The

# Supreme Court of the United States

THE UNITED STATES OF AMERICA,

*Petitioner,*

versus

JUAN RESENDIZ-PONCE,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF *AMICUS CURIAE* PAUL HARDY IN SUPPORT OF RESPONDENT JUAN RESENDIZ-PONCE


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## QUESTION PRESENTED FOR REVIEW[1]

### I.

**Whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error?**

[1] The names of all parties to this proceeding appear in the caption. See Rule 14.1(b) of the Supreme Court Rules.

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## INTEREST OF *AMICUS CURIAE*

Paul Hardy respectfully submits this brief in accordance with Supreme Court Rule 37.3.[2] Hardy is a defendant facing a federal capital resentencing hearing, following an appeal in which his death sentence, but not his conviction, was overturned. *See United States v. Causey*, 185 F.3d 407 (5th Cir. 1999). The indictment on which the Government seeks to execute Hardy indisputably lacks the statutory aggravators and mental state element required for the imposition of the death penalty under federal law. Nevertheless, the Court of Appeals for the Fifth Circuit has ruled that the Government may go forward with capital proceedings. *See United States v. Davis*, 380 F.3d 821 (5th Cir. 2004). In the view of the Fifth Circuit, the error in Hardy's case has already occurred, even though his resentencing has not, and this error can be evaluated using a harmless error [*Chapman*] analysis.

According to the Fifth Circuit, when the *Chapman* analysis is conducted in Hardy's case, the error is revealed as harmless, because "any rational grand jury" would have indicted him for a capital offense, had it been asked to do so. Following the grant of *certiorari* in the instant proceeding, Hardy's resentencing was stayed by the district court, because it viewed this proceeding [*Resendiz-Ponce*] as

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[2] The parties consented to the filing of this brief, and copies of the written consent of the parties have been filed with the Clerk of Court. The brief was not authored in any part by counsel for either party. No person or entity other than *amicus curiae* has made a monetary contribution towards the preparation or submission of this brief. However, counsel for *amicus curiae* will seek compensation for their time, and reimbursement for their expenses from the United States, pursuant to the Criminal Justice Act (18 U.S.C. § 3006A).

potentially dispositive of the issues in Hardy's case. Counsel for Hardy concur, hence this brief as *amicus*.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . .

The Sixth Amendment to the United States Constitution, provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . .

## STATEMENT OF THE CASE

*Amicus* Paul Hardy adopts the statement of the case of the Petitioner, the United States.

## SUMMARY OF THE ARGUMENT OF *AMICUS* PAUL HARDY

In calling for the application of the harmless error rule to the omission of an element of the offense sought to be charged from a grand jury indictment, the United States ignores the constitutional role and function of a grand jury. Although grand juries are subject to certain

judicial constraints, grand juries cannot be viewed as performing a judicial function. Rather, they stand *between* the executive branch and criminal proceedings in the federal courts, and actually perform what is tantamount to an executive branch function: deciding who will be charged, when they will be charged, and what they will be charged with. Put most bluntly, the United States misses the point completely when it argues for the blanket application of a standard of *judicial* review to that function of the grand jury that is best understood as an *executive* branch *decision-making* process.

Accordingly, the omission of an element of an offense from an indictment is **not** analogous to the omission of an element of an offense in instructions to a petit jury. The omission of an element from an indictment means the executive branch has either erred, or, as in *amicus* Hardy's case, made a deliberate choice regarding the indictment presented to the grand jury for its decision. Normally, such executive branch decisions are not subject to judicial review for "harmlessness."

On the other hand, when an element of an offense is inadvertently omitted from jury instructions, it means there has been *judicial* error, in *judicial* proceedings, and review by higher courts is proper, under the appropriate standard of judicial review.

Although this Court's decisions do not preserve this constitutional distinction perfectly, by and large it is honored. A careful review of this Court's opinions, beginning with *United States v. Mechanik*, 475 U.S. 66 (1986) and ending with *United States v. Cotton*, 535 U.S. 625 (2002) demonstrates an ever-present implicit, and occasionally explicit awareness of the constitutional allocation

of roles assigned to grand juries on one hand, and petit juries, on the other. Moreover, the decisions of this Court in *Apprendi*, *Jones*, and *Ring* militate strongly against the arguments of the United States.

Finally, if – as requested by the United States, this Court adopts a harmless error standard of review for the omission of the elements of an offense from an indictment – the Court will have completely insulated the Government from all consequences of erroneous decisions or misguided choices regarding indictments in federal proceedings. If a trial is conducted on a flawed indictment, over the defendant's objection, and the defendant is acquitted, the impact of the Government's error is never known. On the other hand, if the defendant is convicted, then the Government is *always* in a position to argue that the error was harmless, else the properly instructed petit jury (taken from the same venire as the grand jury) would not have convicted.

Worse, using a harmless error standard to review legally inadequate indictments permits courts, like the Fifth Circuit in *amicus* Hardy's case, or like the district court in Respondent Resendiz-Ponce's case, to go *forward* on flawed indictments, knowing that the error that is about to be committed will be absolved by the doctrine of harmless error. Accordingly, *amicus* Hardy urges this Court to affirm the decision of the Ninth Circuit, and find that the omission of an element of an offense from a federal indictment is presumptively prejudicial, and not subject to harmless error analysis, when the omission is objected to before trial.

## ARGUMENT

### 1. The essential function of grand juries

Fortunately, this proceeding does not require counsel for *amicus* to summarize, much less reconcile the numerous, and sometimes conflicting views of the history of the grand jury – because that would be a task well beyond their ability. It is sufficient for the purposes of this brief to note that most, if not all histories of the grand jury are consistent on one point: since the publication of the Assize of Clarendon in 1166, the essential *function* of grand juries has been to investigate crimes, and to indict those suspected of committing them. *See* T. Plunkett, A CONCISE HISTORY OF THE COMMON LAW 112-13 (5th ed. 1956); 1 F. Pollock & F. Maitland, THE HISTORY OF ENGLISH LAW 151-53 (2d ed. 1898); Helmholz, *The Early History of the Grand Jury and the Canon Law*, 50 U. CHI. L. REV. 613, 613 (1983), and R. Younger, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES 1634-1941, at 5-6 (1963).

And thus, while placing that power and function in the hands of the people provides a shield for the citizenry from arbitrary government conduct, the existence of that shield does not change the nature of the essential task of the grand jury, which is, to continue the metaphor, to act as a sword. *See, e.g.*, *United States v. Calandra*, 414 U.S. 338, 343 (1974) (The grand jury's "responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions.")

Put differently, it is the *placement* of the grand jury in the hands of the people that gives it its protective powers,

but the essence of those powers is unchanged: they are executive in nature, not judicial. Once that is understood, an analysis of whether the grand jury was acting as a sword or a shield at any given point in American history after the ratification of the Fifth Amendment serves no meaningful judicial purpose.

**2. Judicial review of grand jury issues**

What is meaningful, from a judicial perspective, is an examination of this Court's opinions addressing problems occurring before grand juries, or raised by grand jury proceedings. Viewed most broadly, those decisions fall into two categories: those addressing questions raised by the *administration* of a grand jury; and those which deal with errors affecting the core function of the grand jury: the exercise of its executive branch powers. As shown below, the former cases apply some form of harmless error analysis, the latter, a rule in which prejudice is presumed, if the error was preserved before trial, because the "structural protections" provided by the grand jury have been compromised.

In *United States v. Mechanik*, 475 U.S. 66 (1986), the Court determined that a violation of Federal Rule of Criminal Procedure 6(d) – one which had no demonstrable effect on the indictment returned by the grand jury – could be treated as harmless. Significantly, the Court

> . . . assume[d] for the sake of argument that the simultaneous presence and testimony of the two Government witnesses before the grand jury violated Rule 6(d), **and that the District Court would have been justified in dismissing portions of the indictment on that basis had there been actual prejudice and had the**

> **matter been called to its attention before the commencement of the trial.** (emphasis added)

*Id.* at pp. 70-71.

This distinction between matters that pertain to the structural protections of a grand jury, and those that do not was further developed in *Bank of Nova Scotia v. The United States*, 487 U.S. 250 (1988). In that opinion, this Court rejected an effort to divide error relating to grand jury proceedings into the categories of "harmless" versus "fundamental," but instead specifically looked to whether the error reached to such "structural protections" of the grand jury, *i.e.*, to those aspects of the grand jury relating to the constitutional constraints on its power:

> We think, however, that an alternative and more clear explanation is that these cases are ones in which the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice. See *Rose v. Clark*, 478 U.S. 570, 577-578 (1986). These cases are exemplified by *Vasquez v. Hillery*, 474 U.S. 254, 260-264 (1986), where we held that racial discrimination in selection of grand jurors compelled dismissal of the indictment. In addition to involving an error of constitutional magnitude, other remedies were impractical and it could be presumed that a discriminatorily selected grand jury would treat defendants unfairly. See *United States v. Mechanik*, supra, at 70-71, n. 1. We reached a like conclusion in *Ballard v. United States*, 329 U.S. 187 (1946), where women had been excluded from the grand jury. The nature of the violation allowed a presumption that the defendant was prejudiced, and **any inquiry into**

> **harmless error would have required unguided speculation.**

*Bank of Nova Scotia v. The United States*, 487 U.S. 250, at 256-257. (emphasis added)

It is hard to imagine speculation more "unguided" than speculation about how a "reasonable grand juror" might have voted, when the speculation is based on evidence the grand juror may never have heard; indeed, which may not have existed at the time the case was presented to the grand jury.

In this same line of cases is *United States v. Cotton*, 535 U.S. 625 (2002), and contrary to the Government's suggestion, that opinion does not compel the result the Government seeks here. Seen in its most basic terms, *Cotton* stands for the proposition that the omission of an element of an offense from an indictment, not objected to until *after* trial, is not an error that affects the fairness, integrity, or reputation of *judicial* proceedings. This does not mean that the error is not fundamental, or that it should not result in a dismissal of the indictment, if objected to **prior to trial**.

### 3. Errors in grand jury indictments, and the other caselaw of this Court

Treating the omission of elements from indictments as presumptively prejudicial, if the omission is objected to prior to trial, is not only consistent with this Court's caselaw regarding grand juries, it is the only rule that can be squared with both *Chapman v. California*, 386 U.S. 18 (1967), and this Court's decisions in *Jones v. United States*, 526 U.S. 227 (1999), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002).

### A. Grand juries and *Chapman*

It cannot be emphasized too strongly that *Chapman* creates a standard for reviewing *trial* errors, and that the standard passes constitutional muster, and works, only because a reviewing court can look at both the error complained of, and the *proceedings in which the error occurred*, to determine the impact of the former on the latter.

When elements of an offense are missing from an indictment, the same kind of review is impossible to conduct, because the error can never be examined in light of the proceedings in which the error occurred, given the rule of grand jury secrecy. Thus, it can never be known if the omission of the element was deliberate, accidental, or the result of some other factor. Moreover, looking at trial evidence for a *post-hoc* determination of what a rational grand jury would have done is, in one sense, to ignore the reality that in many instances, the impact of the error can never actually be known. As this Court said in *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) (emphasis added):

> Nor are we persuaded that discrimination in the grand jury has no effect on the fairness of the criminal trials that result from that grand jury's actions. The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a non-capital offense – all on the basis of the same facts. Moreover, "[t]he grand jury is not bound to indict in every case where a conviction can be obtained." *United States v. Ciambrone*, 601 F.2d

616, 629 (CA2 1979) (Friendly, J., dissenting). **Thus, even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come.**

### B. Grand juries and *Jones*, *Apprendi*, and *Ring*

The other principle to be honored is the one established by *Jones*, *Apprendi*, and *Ring*. Simply put those cases establish that there must be congruence between and among the offense charged by the grand jury, the verdict rendered by the petit jury, and the sentence imposed by the court. As this Court wrote in *Blakely v. Washington*, 542 U.S. 296 (2004):

> This case [*Blakely*] requires us to apply the rule we expressed in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L.Ed. 2d 435, 120 S.Ct. 2348 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours," 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that "an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the

> common law, and it is no accusation in reason," 1 J. Bishop, Criminal Procedure § 87, p. 55 (2nd ed. 1872).[footnote omitted] These principles have been acknowledged by courts and treatises since the earliest days of graduated sentencing; we compiled the relevant authorities in *Apprendi, see 530 U.S., at 476-483, 489-490* (THOMAS, J., concurring), and need not repeat them here. [footnote omitted].
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> * * *

It is one thing to make a verdict congruent to an indictment; or a sentence congruent to a verdict. It is quite another to make the flawed indictment itself, a charge which "lacks any particular fact which the law makes essential to the punishment . . . [one which is] no accusation within the requirements of the common law, and it is no accusation in reason," congruent to a subsequent verdict, one reached through different proceedings, held at a different time, in front of a different body with different constitutional obligations, who heard different evidence.

**4. The ramifications of the adoption of a harmless error standard.**

As a practical matter, there are very few federal prosecutions that would be affected every year by a rule that treated the omission of the element of an offense as presumptively prejudicial, if objected to before trial. Moreover, in most instances the error could easily be cured, by obtaining a superseding indictment – either because the court dismissed the original one, or because a prosecutor thought it a prudent thing to do. And if the flawed indictment were not objected to prior to trial, then the rule established by *Cotton* would apply: the burden

would be on the defendant to demonstrate that this error seriously affected the fairness, integrity, or reputation of judicial proceedings.

To take any other position is to read the indictment clause out of the Fifth Amendment. If it is acceptable to be missing one element, why not two, or three? The result would be the same – a conviction proves that a rational grand jury would have charged the missing elements.

But the history of the grand jury belies this approach: if a crime has not been charged, then a crime has not been charged, and no amount of *post-hoc* rationalizing can change that fact. The opinion of the Ninth Circuit should be affirmed.

## CONCLUSION

Wherefore, this Court is respectfully urged to affirm the opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted, this 10th day of August, 2006.

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